JAMES H. McKENN

Brief of Cessna & Rae
Supreme Court of the United Sta

OCTOBER TERM, A. D. 1897.

Filed Dec. 27, 1897.

No. 78.

J. B. CESSNA, J. B. KEEDLE ET AL.

vs.

THE UNITED STATES ET AL.

Appeal from Court of Private Land Claims.

ARGUMENT FOR APPELLANTS

BY

J. B. CESSNA.

ROBERT RAE,
T. B. CATRON,
J. B. CESSNA,
Solicitors for Petitioners.

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ARGUMENT FOR APPELLANTS.

This case is appealed from the United States Court of Private Land Claims, and is here upon the following statement of facts:

The plaintiffs in this case in their petition alleging that they are the heirs and legal representatives of John G. Heath, asked for the confirmation of a grant of a tract of land made by the Ayuntamiento of El Paso, Mexico, April, 1823, under and by virtue of the colonization law of Mexico of January 4, 1823, to Juan Gid, English John G. Heath. This petition further alleges that on April 3, 1823, John G. Heath, under his Spanish name and signature Juan Gid, petitioned the Ayuntamiento or Town Council of El Paso, Mexico, to grant him a tract of land lying on the Rio Grande river, thirty or forty miles North-west from El Paso, taking the head of the Bracito acequia as the central point of a square two and a half leagues North, South, East and West, making a square of five leagues on each side. On same day said petition was accepted and the said Ayuntamiento in due formality of law proceeded to make, execute and deliver to the said John G. Heath (Spanish Juan Gid), a grant to said tract of land as prayed for. After publication of notice of said petition, read at a public meeting April 13, 1823, a commission was appointed by said Ayuntamiento with full authority in the premises to survey, mark, designate and separate said land from the public domain. On April 17th, 1823, said commission put the said John G. Heath, alias Juan Gid, into full possession thereof, and on the same day made a full, complete, and accurate report in writing of what they had done to the honorable Ayuntamiento aforesaid, which was thereupon accepted, adopted, and confirmed, April 25, 1823, it was consid-

ered by the said Ayuntamiento that the grant of said tract of land called the Bracito was concluded and the fee for the same was assessed and paid by the said John G. Heath, the grant was filed and recorded in the archives of said Ayuntamiento, a certified copy sent to the Governor of the province at Santa Fe, and there filed, where it remains to-day; and another copy given to the grantee.

These various proceedings in the making of said grant being properly translated are fully set out in plaintiff's petition. Copies of which were attached to and made a part of said petition marked Exhibit from "A" to "O," except Exhibits "K" and "L" which are English and Spanish copies of all the papers in the grant. In the arrangements made here of Exhibits, we have followed the order of the Ayuntamiento giving a copy of the proceedings of the town council of El Paso of April 3, 1823, last. This in plaintiff's bill is Exhibit "A." Copies of all the necessary and important parts of the proceedings in said grant are as follows:

EXHIBIT "B."

Copy of the proceedings had upon the petition of Juan Gid, Anglo-American, in which he prays that the tract of land of the Bracito be granted to him for a settlement and other matters herein appearing:

ISSUED BY THE ILLUSTRIOUS AYUNTAMIENTO OF THE TOWN OF EL PASO, DEL NORTE, YEAR 1823.

Dr. Juan Gid, citizen of the United States of North America, in due legal form appear before Your Excellency and represent, that not having received up to this date any reply to the petition which in December last, last year, I laid before the Ayuntamiento, your predecessor which sustained in all its parts, was forwarded by the said Ayuntamiento to His Imperial Majesty, under and by virtue of the authority which is conferred upon Your Excellency by the law of colonization which under date of January 3d of the present year was enacted by the National Organic Junta of the Empire, I therefore apply, de novo, repeating my prayer, and add that I propose to bring to the settlement of the land of the Bracito, which I ask be granted to me, thirty families of Catholic Christians, and among them mechanics, blacksmiths, armorers, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors, and to establish a hospital with the corresponding drug store, the same to be adequately stocked, together with the necessary instruments for any operation, and also to establish a warehouse stocked with all kinds of goods to sell at wholesale, and to introduce the necessary machines for the manufacture of woolen and cotton cloths, and another for the manufacture of powder, proposing until the expense of transportation is covered to furnish the supply of this article that the whole of this jurisdiction may require at the very low price of one dollar per pound, the same being of the first class for the use of arms, with the understanding that in all the professions cited those youths whose parents shall desire to have them learn the profession shall be admitted, the preference being allowed to the native youths of this country.

In consideration of the foregoing, and inasmuch as in order to establish the said machinery, cultivate the land and graze the live-stock and promote other out-door interests, it is indispensable that the land be large enough to meet all the requirements in the premises, it is therefore proper for me to demonstrate to Your Excellency that the land may be assigned me shall be at least enough for farm, and that the land be upon both sides, that is to say, upon both banks at the Bracito, for as in said tract is not regular, it is necessary to eject certain parties therefrom.

I also suggest that until time will permit the realization of the other cal-

culations the said settlement be annexed to the parish of this jurisdiction, and also that the pasturage and wood be used in common, with the same privilege as the other persons of this jurisdiction, with the understanding that no prejudice shall be occasioned the planting grounds, and that your petitioner be designated as the person for the distribution of the said land, and to be respected as the legal justice for the said families.

The welfare of the soul being to me what I prize above all things, and as I unite myself with my brethren the faithful people of this empire, and I keeping myself always in quiet peace so as to prevent any calumnious reports, I ask Your Excellency, if deemed proper, and in order to carry out in all respects the aforesaid colonization law, that the people of this jurisdiction be informed of this my petition to the end that all those men that may choose to do so may agree and regulate themselves in view of the right to preference, to the end that Your Excellency, to whom is charged the power as father of this country, should weigh in its value the incalculable benefits that through my petition may result, which far from being deprived of them should be encouraged in every way to procure its increase.

Therefore, I ask and pray Your Excellency to be pleased to accede to my prayer and to excuse the defect of not having drawn this my petition on paper of the proper stamp, there being none in the country, I standing ready to satisfy the fees that are due the National Treasury; I protest not to act in dissimulation and whatever be necessary, etc.

Paso, 7th April, 1823.

JUAN GID.

EXHIBIT "C."

Town Hall of El Paso, April 7, 1823, the petition of Juan Gid being presented, the same was granted by the honorable body upon the terms agreed upon in the proceedings of this day, which becoming known to Juan Gid he agreed to the same, and therefore on Sunday, the 13th instant, the said application and action thereon will be published at this place for the purposes indicated.

Thus Jose Ygnacio Rascon and Jose Morales, constitutional alcaldes and executors of the orders of its Excellency, have commanded and signed before me, the corporation secretary, to which I certify.

JOSE YGNACIO RASCON.
JOSE MORALES.

JUAN MARIA PONZE DE LEON, Secretary.

EXHIBIT "D."

At the town of El Paso, Del Norte, on the 13th day of the month of April, year one thousand eight hundred and twenty-three, being assembled in the hall of the honorable town council, with a large attendance of the people who had been called together by the customary previous notice, the petition of Juan Gid and the action thereon was publicly read and the people having heard the same and being asked by the first alcalde as to whether they were satisfied with the new residents who intended to locate in this jurisdiction, he was answered by many voices in the affimative, manifesting satisfaction and no opposition, wherefore and whereupon it was decided that upon the sixteenth day of the present month, in pursuance of the action aforesaid, Jose Morales, Alcade of second election, Jose Maria Belarde, first alderman; the corporation Attorney, Lorenzo Pravo, and the corporation secretary, proceed with the petitioner to the place Bracito for the purpose of executing the survey and carrying out the directions of its excellency made under the sovereign decree of January 3rd, concerning the colonization system.

Thus have the two alcaldes hereby agreed and signed before me the public secretary, to which I certify.

JOSE YGNACIO RASCON.
JOSE MORALES.

JUAN MARIA PONZE DE LEON, Secretary.

EXHIBIT " E."

TOWN HALL OF EL PASO,
April 15th, 1823.

Agapito Albo, deputy in the most excellent corporation of this Province and who resides at this town as Attorney for this corporation appeared and stated; that in the performance of his duty, and as deputy from this district, he said that the Ayuntamiento having determined to favor the families which Juan Gid proposes to establish at the Bracito, it appears to him that the fields and mills which the new settlers proposed to establish might in a few years be injurious to the old settlers of this entire jurisdiction on account of the water above being cut off and and consumed in those fields, it could not reach the other fields in the abundance desired, which statement being received by the honorable members. they proceeded to discuss the same, and it was resolved by an unanimous vote that the petitioner Juan Gid be called, who being present stated, that should the event arrive of a scarcity of water in this bounteous river it was understood by himself and the families with him that they should be governed by the wise and prudent laws of the empire and by the regulations of the Ayuntamientos, whose duty it is under the laws to see that water is properly distributed. In consideration of this, and that the said Juan Gid again expressed his subjection to the laws and ordinances of the empire, it was resolved to continue the execution of the decree of the 13th instant, made in compliance with the first action of its Excellency.

It is hereby so determined and ordered the members composing this honorable corporation signing this decree before me, corporation secretary, to which I certify.

Jose Ygnacio Rascon.
Jose Morales.
Jose Maria Belarde.
Jose Francisco Carbayal.
Juan Maria Barela.
Antonia Prudencio.
Jose Maria Garcia.
Saturnino Aguilar.
Jose Manuel Garcia.
Juan Jose Gil.
Lorenzo Provo.
Jose Albares.

Juan Maria Ponze de Leon, Secretary.

EXHIBIT " F."

TOWN HALL OF EL PASO,
April 16th, 1823.

The preliminaries for proceeding to the execution of the survey of the tract of Bracito and the act of possession thereof to Juan Gid, the papers in their present condition will be turned over to the commission composed of Messrs. Jose Morales, Second Alcade, Alderman Jose Maria Belarde, Public Attorney, Lorenzo Provo, and corporation Secretary Juan Maria Ponze de Leon, in order that when their purpose is accomplished in accordance with the foregoing decree, they may return the same to this corporation for the necessary remaining proceedings thereon.

And the honorable Ayuntamiento has hereby so determined, the President of the same signing this order before the secretary thereof to which I certify.

Jose Ygnacio Rascon.

Juan Maria Ponze de Leon, Secretary.

EXHIBIT "G."

Bracito, April 17th, 1823.

The commission appointed by decrees of the honorable Ayuntamiento consisting of four individuals for the purpose of executing the papers in this case, having accepted the charge, we proceeded to this place, where, in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid is to be placed, he in sign of possession with an ax cut the bark from two cottonwood trees and where the wood of the trees was exposed, wrote thereon, " Hazda de Dn. Juan Gid," and the present year on both of the trees.

And then the commission as well as the party interested Juan Gid, being present, they appointed surveyors Messrs. Francisco Lucero and Jose Royval, who promised to perform with fidelity the duties of their appointment, for the commencement of which they were furnished with an iron chain in good condition, which being measured with the utmost care contained eleven varas of three geometric feet according as required by the colonization law.

Immediately thereafter the first survey was commenced, about one o'clock in the afternoon, towards the north (having ascertained this point with perfect reliability, for the process was executed by an Anglo-American mathematician, who took the courses with the compass) concluding the measure at four o'clock the same evening, upon a hill, it being in line where a landmark, a cross, was placed, at the foot of which Juan Gid buried a stone with his name and the date being written thereon, and which stone was acknowledged by him to be his legal boundary, and the full measurement of two and a half leagues of five thousand varas from the center. And turning toward the east the survey was commenced at about three o'clock in the afternoon using the compass, for taking an air line as there was no water observed on that course that might be desirable for a settlement or a ranch, and it was estimated that the two and a half leagues was reached upon a hill called La Cueva in the Organ Mountains. And taking up the survey at about half past four o'clock in the evening from the landmark, a cross, and running west it was continued until sundown, passing on the line the road going to the salt river, and descending a ridge a league and three cordels of 110 varas was completed, and at sunrise the survey was again continued until completing the two and a half leagues which was done upon a hill belonging to the Roblero Mountain between a black mountain on the left and a red one on the right, and with the same formality as with the other landmark, the corner was placed at this point. And at about 12 o'clock the commission, the party interested, and the surveyors returned to the central point of said land, where, at about three o'clock p. m., the first survey was taken up and run south, continuing the survey of the line until sunset, where a league and three cordels of 110 varas was finished. At sunrise the survey was continued until two and a half leagues was completed which was done in a small valley running up from the river towards the prairie below the Mesilla and opposite the Ochoa bluffs, where a landmark, a cross, was placed with the same formality as the other landmarks. And the survey being continued west from the line running south with only the compass, the same was extended to where the two and a half leagues reach, for the same reasons as given for the line run eastward to the Cueva of the Organ Mountains, the line being completed at half past nine o'clock a. m.

And beginning to run eastward about ten o'clock of the same day there were up to the Copper road 19 cordels of 110 varas, and up to the river 59 varas, where it being the hour of mid-day the said survey was suspended, which hour having passed the survey was resumed at about two o'clock p. m., and continued until the two and a half leagues was finished which was upon a hill lying to the right of the Trujillo Salt Lakes, somewhat in advance of these and opposite the last ridge of the El Paso mountain called the Puerto de los Alamitos, and in a line with the watering place of Las Crucitas, where, about three o'clock p. m., was placed the corner landmark with the usual formality, with which requisite proceeding, the survey with the vara of three geometrical feet was concluded, and in which proceeding the alcade commissioned inquired in due legal form of the surveyors whether they had proceeded in the legal manner that they promised to observe in running the first line they surveyed of that tract, and they replied that they had so acted, and they had no doubt and rested under no responsibility as they acted as they had promised to do, whereupon the party interested, Juan Gid, was asked whether he was satisfied with the whole survey made of the land into full possession of which he was to enter under the colonization laws, and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land he was in all respects satisfied.

With which understanding and there not having appeared any claim to suspend the carrying out of these proceedings, this commission placed the said Juan Gid in lawful possession of the said land, informing him that the cultivable land he has upon the tract is the greater part of the prairie of the river, and that this land he should not use except for the cultivation of the various kinds of edible grain, and for the production of the necessaries for his agricultural business, and that the land granted him outside of the said river prairie is deemed sufficient for the raising of all kinds of live-stock, charging him also that he should convey all the water he may use for the

running of the machinery he proposes to erect as well as all other water to the main channel, so that this city nor any other vicinage of which it is the seat shall in any manner be injured, and informing him finally that the object for which the four individuals present had come commissioned was concluded with this instrument which contained the proceedings up to this juncture was signed by the alcade Jose Morales, Alderman Jose Maria Belarde, Corporation Attorney Lorenzo Provo, the grantee John Gid, and surveyor Francisco Lucero, the other surveyor Jose Roybal not signing as he did not know how to write, the latter making however with his own hand the sign of the cross, before me the Corporal Secretary, to which I certify.

JOSE MORALES,
JOSE MARIA BELARDE,
LORENZO PROVO,
FRANCISCO LUCERO.
JOSE ROYBAL.

JUAN MARIA PONZE DE LEON, *Secretary.*

Having fulfilled the commission conferred upon us by the honorable Ayuntamiento in the matter set forth in these papers, these will be returned to that body in order that it may proceed as indicated in its decree of the 13th instant.

It is hereby so determined by the four commissioners this 21st day of April, 1823, before the secretary to which I certify.

JOSE YGNACIO RASCON.
LORENZO PROVENO.

JUAN MARIA PONZE DE LEON, *Secretary.*

EXHIBIT "H."

TOWN HALL OF EL PASO,
April 22, 1823. Third year of our Independence.

The Ayuntamiento has this day received the report of what, by its direction, was done by the committee appointed from that body for the purpose of executing the survey that was to be made of the Bracito tract, of the same, to be five leagues of each course, the whole comprising an Hacienda conformably with Article 5 of the colonization law, and which tract was granted by the ayuntamiento to Juan Gid for settlement according as hereafter set forth, and he agreeing to what has been done in the premises in all respects by the commission, the same has been reduced to writing in due form, and signed by the president, and other members constituting the Ayuntamiento before me the secretary, to which I certify.

JOSE IGNACIO RASCON.
JOSE MORALES.
JOSE MARIA BELARDE.
JOSE FRANCISCO CARBAYAL.
JUAN MARIA BARELA.
JOSE MARIA GARCIA.
SATURNINO AGUILAR.
JOSE MANUEL GARCIA.
LORENZO PROZO.
JOSE ALBARES.

JUAN MARIA PONZE DE LEON, *Secretary.*

TOWN HALL OF EL PASO,
April 23rd, 1853.

Juan Gid has this day presented a map which was drawn by the Mathematician Guillermo Box, showing the courses and drafted comformably with the survey which was executed of the Bracito tract of land, and the same appearing to this body very useful if annexed to the papers for its clearness and exactness in all time it will be so ordered.

And by this decree it was so determined, ordered and signed before me the secretary to which I certify.

JOSE YGNACIO RASCON. ANTONIO PRULENCIO.
JOSE MORALES. JOSE MARIA GARCIA.
JOSE MARIA BELARDE. SATURNINO AGUILAR.
JOSE FRANCISCO CARBAYAL. LORENZO PROZO.
JUAN MARIA BARELA. JOSE ALBARES.

JUAN MARIA PONZE DE LEON, *Secretary.*

TOWN HALL OF EL PASO,
April 25th, 1823.

It appearing to this ayuntamiento proper to annex to the papers the resolution of this body, of the 3d day of this month, concerning the grant to the Bracito tract of land to Juan Gid, it will be so annexed for the greater clearness and illustration of the matter. And the president of this honorable body hereby so decreed, ordered and signed, before me the secretary, to which I certify.

JOSE YGNACIO RASCON.

JUAN MARIA PONZE DE LEON, *Secretary.*

EXHIBIT "J."

TOWN HALL. EL PASO.
April 25, 1823.

It being considered by this Ayuntamiento that this case is concluded in which the land tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, the fee on the same will uow be assessed, which will be done in accordance with the tariff governing in this Ayuntamiento, and by its secretary, to the end that Juan Gid may be advised of the fees he will have to pay for what has been done in this case, this original be filed for perpetual evidence, and without the risk of failure to report by the first mail or by some safe conveyance to His Excellency the Governor of this Province, forwarding one certified copy to him for his information, and a like copy to the party interested for his security.

And by this decree the president and members of this body so resolved and signed, before the Secretary, to which I certify.

JOSE YGNACIO RASCON. SATURNINO AGUILAR.
JOSE MORALES. JOSE MANUEL GARCIA.
JOSE MARIA BELARDE. LORENZO PROVO.
JOSE FRANCISCO CARBAJAL.

JUAN MARIA PONZE DE LEON, Secretary.

A copy from the original papers drawn up at the request of Juan Gid in the grant to him for settlement of the Bracito tract of land under the colonization laws, together with other documents elsewhere referred to, and which original remains duly on file, to which I certify.

JUAN MARIA PONZE DE LEON,
Secretary.

Exhibit "O" is a copy of the draft of the survey of the land granted, which draft was attached to and made part of the records of the original grant. As the certificate shows, it was made by Wm. Box, by order of the Gentlemen Commissioners of this jurisdiction of El Paso for the Illustrious Ayuntamiento. Wm. Box, being an American mathmetician, the Spanish name Juan Gid does not appear in the draft, but the original certificate in Spanish contains the name of Dr. John G. Heath.

EXHIBIT "A."

TOWN HALL OF EL PASO,
Del Rio Del Norte,
April 3d, 1823. Third year of our Independence.

In session of this day came Juan Gid, a physician, Anglo-American, from the State of Missouri, inquiring what had been done with the petition which had been addressed through the former Ayuntamiento, under date of the 27th of December of last year, to His Imperial Majesty, by the office of the Secretary of State, and it is answered to him that there has been received no direct reply, but that the Government of this province, through Captain General Jose Antonio Viscarra, civil and military chief, in his official communication of the 2d of March, transmitted and commanded to be published and carried out the decree of the 3d of January of the present year, emanating from the Organic National Junta and sanctioned by his Imperial Majesty, and whose thirty-two (32) articles treat of the subject of colonization. These were read to the said Juan Gid, and he being fully informed thereupon has this day made a new application praying that by virtue of the law and of his privilege a grant to be made to him for a hacienda on the same tract that he applied for, promising for the benefit of this people of the Mexican nation, to fulfill all that he in that petition promises to do.

This body bearing in mind the colonization laws referred to and the aforesaid propositions which it deemed beneficial and favorable to this people, and hearing the opinion expressed by persons of this community, resolved as follows concerning the petition:

FIRST. That with the superior will of the Governor, to whom report will be made, his petition is admitted and its proposition accepted, and when he shall present himself, the land he applies for shall be designated to him in the following terms: The head of the Bracito acequia shall be the central point of the square of the said tract; that is to say, two and a half leagues from the river and the same on the side formed by the square.

SECOND. That considering that this jurisdiction, whose territory extends to San Diego, contains timber up the river only, and that Juan Gid and the families with him pasture their stock in that direction, they may locate their hacienda only upon land to be used for field factories, machinery, etc., and not upon the natural pastures and timber grounds which shall be in common for these inhabitants and this jurisdiction, as they are also for the new settlers.

THIRD. That this resolution and the application of Don Juan be made public in order that, should any Mexican citizen of the jurisdiction make for the benefit of the community similar propositions and promise to observe the respective articles of the dec e aforesaid, such application may be accepted in preference to any foreigr r, and for that purpose a term of three days is allowed, and the same term will also serve as time in which the public may manifest whether with their full consent they will have these neighbors, who promise them instructions in trades and manufactures, they settling at the Bracito, which is a distance of sixteen or eighteen leagues from the jurisdiction on the frontier, and adjoining the regular ranchries of the Apaches.

FOURTH. That Juan Gid holding the proprietorship of the lands of the Hacienda, any of the inhabitants of this district desiring to remove to the Bracito, for the purpose of settling at the place, must arrange with him.

FIFTH. The propositions made by the new colonist in favor of this community are accepted, and it is hoped that he will fulfill them, as well as the articles of the colonization decree, which contemplate him, and this Ayuntamiento enjoins it upon him that the families he may transport hither may be persons of probity and of the apostolic Roman Catholic faith, the only religion in all the empire, the laws of which they shall all obey, though they do not become naturalized.

SIXTH. That some of the alcaldes, an alderman and a corporation attorney, will proceed to the survey of the limits of the hacienda, and the giving of possession thereof, and they, together with Juan Gid, will ascertain on the tract of the hacienda the lands proper for settlement, agriculture, machinery and manufactures, and separate the same from those proper for pasturage and stock-raising.

And it is expected from the new settlers that as soon as possible they will surround themselves with groves and will preserve order by police, so as to

afford more easy spiritual and temporal illustration and administration, the same to be regulated by the ordinary secular and ecclesiastical authorities respectively, for which purpose they will proceed under this act, of which an authentic copy will be made for the security and information of the party interested, this original and the petition of Don Juan to be placed on file for perpetual testimony.

Thus, the honorable members have resolved, they together with the two alcaldes signed this act, before me, the corporation secretary, to which I certify.

Jose Ygnacio Rascon.	Jose Manuel Garcia.
Jose Morales.	Jose Ma. Garcia.
Jose Maria Belarde.	Juan Gil.
Jose Francisco Carbajal.	Lorenzo Provo.
Juan Maria Barela.	Jose Albares.

Juan Maria Ponze de Leon, Secretary.

A copy from the original in the record book of the acts of this honorable corporation, kept in my office, to which I certify.

Juan Maria Ponze de Leon,
Secretary.

Plaintiffs petition further alleged, that all of which said papers are included in one general exhibit herewith filed, marked Exhibit K, to which is attached the certificate made by the Secretary of the Ayuntamiento, that the same is a copy from the original papers drawn up at the request of Juan Gid, in the Grant to him for the settlement of the Bracito tract of land, under the colonization laws together with other documents elsewhere referred to, and that the original thereof remains duly on file, to which he certified.

The said Exhibit K is a correct translation of the said copies which were forwarded to the Governor of the Province of New Mexico, and which said copy so forwarded to him has ever since remained on file among the archives of the Territory of New Mexico, and is now on file as one of the original papers belonging to the archives in the office of the surveyor-general of the territory of New Mexico, to which reference is hereby made for a more specific understanding of the same. (See page 157 of Record.)

The petitioners alleged that the said Juan Gid complied with all the conditions and requirements of said grant and the law under which it was made, so far as he was required to do by law, and the acts of the grantors.

Petitioners further show by virtue of the proceedings above recited and mentioned, that the grant to said Juan Gid became an absolute and perfect grant, and the said Juan Gid obtained a perfect title to said land; and that the petitioners as his heirs, descendants and legal representatives of his heirs and descendants, have become and are the owners in fee of said lands and entitled to the same as an absolute and perfect grant, and are entitled to so hold and possess the same.

Petitioners further state that there are three settlements either wholly or in part within the limits of said grant, one being the settlement known as the Dona Ana Bend Colony, another being

the settlement known as the Messilla Colony, and the other being the Hugh Stevenson tract of land, so called; that the settlements comprise two or three thousand people, the name of said settlers constituting them being to your petitioners unknown, and they being also too numerous to mention herein, your petitioners being all residents beyond the limits of this Territory and not being familiar with the names of the persons residing within the limits of said tracts of land; and that they are therefore unable to give the names of any of the parties so residing within the said limits; and petitioners are informed that some other supposed grants or concessions have been made by the United States to individuals unknown to the petitioners, which grants of lands petitioners cannot now specify or describe, nor give the names of the parties to whom they were made; and petitioners therefore pray that proper notice may be given to such of them as this court shall direct, and in the manner that this court may direct.

By order of court notice was given, and parties have appeared by counsel.

The said claim of Petitioners to said lands has never been confirmed, considered or acted upon by Congress or the authorities of the United States or heretofore submitted to any authorities of the United States, or to any authorities constituted by law for the adjustment of land titles within the limits of said Territory of New Mexico so acquired by the United States; and by them has not been reported upon unfavorably or recommended for confirmation or authorized to be surveyed; but the protocol of the original papers making said grant of land has always been preserved in the archives at Santa Fe, Territory of New Mexico, and reported by the surveyor-general of said territory within recent years to the United States General Land Office at Washington as document No. 505 relating to Mexican and Spanish Land Grants, in archive No. 410.

Petitioners further state that said Juan Gid, alias Dr. John Heath, was a Roman Catholic and professed the Roman Catholic religion, the only religion of the Country of Mexico, "having united himself with his brethren, the faithful people of the empire." Heath died in America in 1850 or '51. See record, page 96.

And petitioners also file map heretofore marked Exhibit O, and included in the grant papers and made a part of this petition, as being a correct plat of the land in dispute.

Petitioners therefore pray that this their petition be considered by this honorable court and that the validity of said grant of lands so made as aforesaid be inquired into and decided, and that said tract, with the boundaries hereinbefore set forth, be confirmed unto the plaintiffs, their heirs and assigns forever, and for such other and general relief as to this honorable court may seem right and proper.

The defendants demurred to plaintiff's petition, giving dif-

ferent causes, all of which might be included in first specification. See 11th page of record.

First. "That the claimants have not in and by their said petition made or stated such a cause as entitles them in this honorable court to any relief as to the matters contained in said petition." After argument at length, the U. S. Court of Private Land Claims overruled the demurrer.

Law Under which the Grant was Made.

This grant was made under and by virtue of the Colonization Laws Imperial Degree No. 5, of the National Junta of the Mexican empire January 4, 1823.

White's Recop. p. 588.
Hall's Mexican Law, Art. 256.
Early Laws of Texas, p. 42.
Rocknell's Spanish Laws, p. 617.

The provisions and sections of this law necessary and essential to a proper construction of our case are as follows:

Augustin, by divine province, and by the congress of the nations first constitutional emperor of Mexico, and grand master of the Imperial order of Guadalupe; To all who shall see these presents, know ye that the junta nacional instituyente of the Mexican empire has decreed and we sanction the following:

The junta nacional instituyente of the Mexican empire, being convinced by the urgent recommendation of the government of the necessity and importance of giving to the empire a general law of colonization, have thought proper to decree as follows:

SECTION 1.—*Civil Rights.*—The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire.

SEC. 2.—*Distribution Lands.*—To facilitate their establishment the executive will distribute lands to them, under the condition and terms herein expressed.

SEC. 3.—*Duty of Empresarios.*—The empresarios, by whom is understood those who introduced at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary in order that with this necessary information the executive may designate the province to which they must direct themselves: the lands which they can occupy with right of property, and other circumstances which may be considered necessary.

SEC. 4.—*Settlement of Families.*—Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

SEC. 5.—The measurement of land shall be the following: Establishing the vara at three geometrical feet; a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios: five sitios shall compose one hacienda.

SEC. 7.—*Labor Defined.*—One labor shall be composed of one million square varas; that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

SEC. 8.—*Amount of Land to a Colonist.*—To the colonists, whose occupation is farming, there cannot be given less than one labor, and to those whose occupation is stock raising, there cannot be given less than one sitio.

SEC. 9.—*Same.*—The government of itself or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeable to the conditions and circumstances of the colonists.

SEC. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

SEC. 11.—*Equal Distribution.*—As one of the principal objects of laws in free governments ought to be to approximate, so far as possible, to an equal distribution of property, the government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands, which have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands to be fixed by appraisers.

Sections 12, 13, 14, 15, and others omitted relate to cities, towns, villages and questions not material to our grant.

SEC. 19.—*Grants to Empresarios.*—To each empresarios who introduces and establishes families in any of the provinces designated for colonization, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

SEC. 20—*Alienation at the end of Twenty Years.*—At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing article, must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

SEC. 21.—*Same.*—The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to congress, with such information as may be deemed necessary.

SEC. 22.—*Right of Occupants.*—The date of the concessions for lands

constitutes an inviolable law for the right of property and legal ownership; should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

SEC. 23.—*Cultivation*—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; *in which case the respective Ayuntamiento can grant it to another.*

SEC. 24.—*Tiths, Duties, Etc.*—During the first six years from the date of the concession the colonist shall not pay tiths, duties on their produce nor any contribution under whatever name it may be called.

SEC. 25.—*Same.*—The next six years from the same date they shall pay half tiths, and half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

SEC. 29.—*Land May be Alienated.*—Every individual shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law.

This is not an Empresarios grant, but was made to Heath as a colonist under the law of 1823 by which the minimum and not the maximum quantity of land to be granted to a colonist was limited —to a farmer there could not be given less than one labor and to a stockman not less than one sitio, and if deemed proper said grant of land might be augmented agreeable to the conditions and circumstances of the colonists, see sections 8 and 9. Heath being a doctor, farmer, stockraiser, a man of influence and wealth and at the head of thirty families a grant in fee was made of a large tract and he as a colonist was put into possession of the same with right of legal ownership vested in him at the date of said concession. There were no conditions precedent in this grant. Like the petition in Aedono's, Heath said grant me in full dominion and absolute property fee simple a hacienda at the Bracito Acequia and I will locate there thirty families, stores, implements, etc., and his proposition was accepted and the grant made. This was not a concession with license or right of grant to be made thereafter as a premium for the number of families introduced. The vesture of title did not depend on any act to be first done by Heath, but the title not being reserved as in an empresarios contracts to be given as the families locate was vested in him at the time possession was given.

The Heath grant embraces 130 thousand acres of land. It is located in the Mesilla Valley in the southern part of New Mexico. Three subsequent grants interfere with and overlap this tract, covering some forty or fifty thousand acres thereof, leaving more than one-half unclaimed and unoccupied.

The grants are known as the Don Ana Bend Colony Grant, Mesilla Civil Colony Grant and the El Bracito Grant made to Juan Antonio Garcia and Hugh Stephenson for about fifteen thousand acres of land. This last grant is the only one that has ever been confirmed by the government of the United States, but its confirmation was subject to the prior right of others if any. No patent has ever been issued for the same. Some twenty years ago efforts were made to have those other two grants confirmed and patented, but congress refused to act in the premises and they now remain unconfirmed.

This grant in itself contains no condition either precedent or subsequent, yet the law under which it was made provided that if the land was not cultivated within two years the title would be voidable and the right of property would be considered renounced. This law of January, 1823, was passed under and the grant to Heath made during the reign of Iturbide. Immediately after the grant a revolution occurred and soon after Iturbide was shot and this law of 1823 repealed. Publication of the repealing act was made after June 17, 1823, more than two months after our grant was made, and by virtue of the laws of Mexico no statute or repealing act took effect until after publication. Therefore, our grant having been made prior to the promulgation of the repealing act, it is valid notwithstanding the repeal.

Immediately upon the grant of said land, Dr. John Heath went to the United States to procure his stores, medicines, implements of husbandry, according to the contract. This he did at the expense of $80,000, and taking them to Mexico, as provided, and on arriving on said premises found that the revolutionary government that succeeded the authorities that made him the grant forbid him remaining upon said premises. The Departmental Assembly having passed a resolution requesting the Ayuntamiento of El Paso in order to avoid responsibility for damages which Heath might claim if he brought his families to that country to notify Heath not to bring his colony to Mexico, further saying that the grant made to him by the Ayuntamiento aforesaid was made in haste and poor judgment for the reason that the law of January 4, 1823, was repealed.

The plaintiffs allege and showed by record and oral evidence that the said John G. Heath did comply with all the conditions, provisions, agreements and requirements of the said grant, and the law under which it was made as far as he was permitted to do so by the grantor, and that by reason of the revolution at that time in Mexico and the hostility of the subsequent officers of the government, the grantor, the settlement of Heath's colony and the cultivation of the soil were prevented, excused and rendered impossible, and that thereby the conditions subsequent of cultivation were released and the estate became absolutely vested in the said John G. Heath.

To establish these facts see depositions of witnesses, page 73 to 143 of the record. The reign of Iturbide was a *de jure* as well

as a *de facto* government, and was so recognized by the United States in March, 1822, and reciprocal political and commercial relations established between the two countries, December 14, 1822, Jose Manuel Zoyaya was received by the United States as Minister Plenipotentiary of Mexico.

Annals of Congress, No. 39, p. 2,099.
State Papers, No. 90 (17 Congress.), p. 56.
Niles' Register, Vol. 23, p. 209, 240.

This recognition was prior to the laws of 1823, and, being made by the proper political authorities, it cannot now be said our grant was invalid upon the allegations that the reign of Iturbidie was a usurpation. No denouncement of this title was ever made by the government of Mexico, as was provided by its laws, statutes and decrees in the case of forfeiture of grants for failure of cultivation of land, or other conditions subsequent. There was no abandonment by Heath of his grant, because his absence was not voluntary, but constrained, forced, banished by threat of arrest and imprisonment on the part of the grantor, which in no event could work a change of domicile, abandonment or loss of property. Therefore, we submit, Heath's title was valid, complete and subsisting when the sovereignty of Mexican government passed to the United States, and for these reasons the case should be reversed and our petition granted.

ASSIGNMENTS OF ERRORS.

1st. The United States Court of Private Land Claims erred in holding:

1st. That, as Heath's land lay outside of the four square leagues presumed to belong to the Spanish town of El Paso, its town council had no authority to make allotments or grants outside of said four square leagues, and, therefore, our grant was void.

2nd. In holding that Heath's grant was void because his family was not present when the grant was made and possession given.

3rd. In holding that the possession given to Heath of a tract of land known as the Bracito, five leagues square with its central point and all its corners definitely fixed, marked and located, was not a perfect grant, but only an allotment or concession which the authorities after revolution could deny at pleasure.

4th. In finding and decreeing that the said petition for the confirmation of the Private Land Claim known as the Juan Gid or John G. Heath grant, has not been sustained by satisfactory proof, and that the said title so asserted to the tract of land claimed to have been granted by the Ayuntamiento of El Paso, under the colonization law of Iturbidie of January 4, 1892, to John G. Heath is of no validity, and that the said grant or concession is not such

a one as the United States is bound to recognize and confirm by virtue of the Treaty of Session by Mexico to the United States.

5th. Erred in ordering and decreeing that the claims to the tract of land known as Juan Gid or John G. Heath grant, situated in the county of Dona Anna, in Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito Acequia, under a grant alleged to have been made on April 3, 1823, by the Ayuntamiento of El Paso to John G. Heath, under the name of Juan Gid, is hereby rejected, and said petition is dismissed.

6th. The court erred in not sustaining plaintiff's petition by decreeing that the tract of land described therein, known as the Bracito, being five leagues square, with the head of the Bracito Acequia as its central point, had been granted to said John G. Heath in April, 1823, by the town council of El Paso, under the law of January 4, 1823, and that the same should be confirmed as the property of his heirs, the petitioners in this case.

Argument and Authorities in Support of the Facts and Legal Propositions to Sustain Plaintiff's Claim.

FIRST POINT.

The grant to Heath was legally made; the Ayuntamiento had full power to grant and confirm titles to lands under the law of January 4, 1823, without the subsequent approval of the governor or department assembly, or the executive of the nation, the words of this act giving authority to the Ayuntamiento to make grants are similar, if not identical, with those of the act of January 4, 1813, and many grants made under this law have been sustained by the governments of Mexico and the United States, and in all these cases it was held that these grants conveyed a fee, and not a license or privilege of settlement only.

First Authority to Make the Grant.

The assignment of errors will be argued jointly in the six propositions we discuss.

The importance of this case, the land covered by the grant being very valuable, and there being many interesting questions of constitutional and international law involved, some of which are entirely new, the act of Mexican Congress, January 4, 1823, having been in operation only a few days, but few grants were made under it, and no case has ever reached the Supreme Court of the United States involving its construction—is our excuse for submitting to this honorable court such a lengthy argument.

Articles 4, 22 and 23 are the most important sections of the act of 1823 in giving the Ayuntamiento authority to make the grant; other articles will be referred to in their proper places.

Section 4.—Settlement of Families.—Families who emigrate, not included in a contract, shall immediately present themselves to the Ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

Section 22.—Right of Occupants.—The date of the concessions for lands constitutes an inviolable law for the right of property and legal ownership.

Section 23.—Cultivation.—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; in which case the respective Ayuntamiento can grant it to another.

In the trial of our case in the United States Land Court at Santa Fe, New Mexico, there was a controversy as to the proper translation of Sec. 4 of the act of 1823. The learned counsel for the defendants sought to have adopted what is known as

MR. TIPTON'S TRANSLATION:

"Article 4. The families who come of themselves to settle shall present themselves *immediately* to the respective Ayuntamiento of the place which they desire to establish themselves, in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the lands to which they are entitled, according to the industry which they are going to undertake."

The United States Land Court adopted our translation. This is *correct*. It is the translation found in White's Recop., p. 588, Hall's Mexican Law, Art. 256; Early Laws of Texas, p. 42, and Rockwell's Spanish Laws, p. 617, and is approved by all the Spanish jurists and scholars. It is substantially the translation made by Ensabio Chacon, official interpreter and translator of the court of paivate land claims. (See p. 32 of the record.) The chief difference in the interpretation is the translation given to the fourth line of Art. 4: "*Para que confirme a las ordenes, con que se hallen del Gobierno,*" etc. By a forced construction Mr. Tipton seeks to render these words into "in conformity with the orders which they have from the executive," while we affirm the correct translation to be, "in conformity with the instructions of the executive," etc., or literally, "in conformity with the orders which they *may find* from the executive."

The chief difference in these translations lies in Tipton's forced rendering of the word "*hallen*" which he interprets "to have" instead of giving its correct meaning "to find". The word "*hallen*" is the subjunctive present of the verb "to find" and the word "*hayen*" is the subjunctive present of the verb "to

have ", and is an entirely different word from " *hallen* " and Tipton uses the present tense of the word " hayen ", a different word from that in the text. The word " hallen " is never translated " to have ", but always " to find ", or some similar word. To support this we refer to a few translations in the treaties with Mexico, Spanish and American original Inter-National Treaties-Hanover and Mexico p. 19 " hallandolos ", translated p. 26 " found to be in due form ". Art. 11, Treaties of Guadalup, Sec. 3, " se hallen denter " " being within ". Sec. 1 Preamble, " hallandolos " " finding them ", and Sec. 4, " hallandolos " " to find ". Extradition Treaty 1861, Preamble, Sec. 4, " hallendolos " " found ". Treaty of 1831, Art. 16, " que se hallosen " " which shall be found ". Art. 21, " si se hallen en el " " if found therein ".

It is argued, and even suggested, by the court, that it was increditable that it should have been intended by the law to confer upon subordinate officers the power to dispose of the public domain to foreigners as they might choose. By referring to history this is explained. While Mexico was ruled by Spain this was true. Public Mexican Law p 27

In 1821 a revolution occurred and Mexico became a Republic: Prior to this the disposition of the King was to retain within himself the right to grant the public lands, but subsequently the policy of the Mexican government was to extend this right nearer to the people. It was thought that a local authority such as town council, where the land was situated would be an appropriate and trusty agent of the government to make grants for the reason that under the circumstances, they could best judge of the qualifications of the applicant as well as the necessities and advantages of the grant. In this view the act of January 4, 1823, was liberally made in the right and authority of the Ayuntamiento to grant and confirm titles to colonists without the approval of governmental authorities, but in all other features this law is similar to prior and subsequent laws. The authority of the Ayuntamiento to make grants in this act is the same as found in other decrees of the Mexican government.

" *A* " *this is a colonists grant and not an Empresario contract.*

Clearly two distinct species of grants are provided for by this law.

1. Empresario grants, which must have been made by the chief executive under certain conditions and regulations.

2. Grants to colonists, to be made by the Ayuntamiento or town councils of the respective districts.

These are the only authorities that have any right to make grants under this act, no other is therein spoken of. It was a complete law in itself on the subject of colonization. The power to grant does not depend in any way on other or previous laws. It stands alone, not referring to or connected with any other act.

Empresarios grants might not be in fee or absolute ownership of property in the first place. The amount to be received by the empresario depended as a premium upon the number of families

introduced. In such case the right of property was not vested until location, survey, possession and title were given. The empresario who was to introduce at least two hundred families, was to receive at the rate of three haciendas and two labores for each two hundred families so introduced. He did not in the first place necessarily receive a title of absolute ownership, that was generally given as a premium after the families were introduced. But we need not argue the character of an empresarios grant under this law. All that is necessary is to affirm and sustain that the act of 1823, provided for a grant to a colonist at once of a specific tract of land with the subsequent condition of cultivation, and not for a mere designation of a large tract of land within which a colony might be founded and established; after which the land to the colonist was to be allotted, and the premium lands to the empresarios measured off.

We believe a similar distinction between empresarios and colonists grants is to be found in this law itself, as is found in the subsequent laws of Coahuila and Texas, and the act of 1824, and subsequent regulations of 1828. By the first the empresario received no title to any lands until the terms of his contract had been complied with. On the other hand, the regulations of 1828, like the provisions of the act of 1823, making grants to colonists, contemplated the issuing of grants in the first place to colonists and empresarios. Political chiefs or governors were authorized to grant vacant lands to empresarios, families or individuals, making no distinction, as is found in the law of 1823, either in the character of the grants or as to who is to make them, or the several classes of persons to whom they might be made. But there is another distinction, between the law of 1823, and the subsequent laws, which is important to remember. The act of 1824 provides that grants made to individuals shall not be definitely valid without the previous consent of the territorial deputation; while grants made to empresarios for themselves to colonize with many families shall not be held definitely valid until the approval of the supreme government be obtained. No such provisions are to be fouud in the act of 1823.

This was nothing unusual, grants were made with or without approval, just as the law provided. From the 15th of October 1754, to the 4th of December, 1786, grants of land were issued by the audencios, and did not require the approval of the King.

See Public Domain 1883, p. 1,130.
How lands were granted in Spain and Mexico, by R. C. Hopkins.

Therefore, it is not surprising for the Mexican government to give this power to the Ayuntamientos, without approval.

The Ayuntamiento was to designate the lands to the colonists, to give to a farmer not less than one labor and to a stock raiser not less than one sitio, Secs. 4-7-9, and then by Sec. 22, it is expressly provided that the date of this concession constitutes an in-

violable law for the right of property and legal ownership. For six years from this concession the colonist was exempt from the payment of tithes, duties, taxes, etc., and by Sec. 29 the colonist was permitted to sell his property. The right of sale is the highest recognition of ownership in property sanctioned by law.

By article 4 the Ayuntamiento was to *designate* the lands to the colonist, while in act 3, the executive was to *designate* the lands to the empresarios. These provisions were in harmony and unison with act 2, that the executive will distribute land to them, UNDER THE CONDITIONS AND TERMS HEREIN EXPRESSED. "The conditions and terms herein expressed" were that to the empresarios he made the grant himself, while to colonists the grants were made through agents delegated, Ayuntamientos. This conclusion is irresistible when we consider the words of Art. 23, "in which case the respective ayuntamiento can grant it to another." The right to grant it to another is conclusive of the previous power to have granted it to the *other*, from whom it was to be taken, therefore construing the whole act to designate land to a colonist means: *to point out, to give, to set off, to grant said lands to him.*

Webster says that designate is from the Latin word designo, Spanish designe, the word used in the original, and means to mark out or show; to indicate by visible lines, marks or descriptions, to point out; to select or distinguish for a particular purpose, to assign. Approved in the Century dictionary.

It is similar to the word *destine*, and Judge McLane in the case of *U. S. vs. Phil., 11 How., 659*, held that destine meant "to set apart for or assign for a particular use in exclusion of all other uses," and hence meant to grant and deliver as property.

In Mexico no particular form of granting lands was necessary. Usually grants were made upon application of the party desiring the land directed to the authority authorized to make the grant, followed with approval of the petition and putting the party into possession of the same. In our case it was the ayuntamiento that was the proper authority to grant and put into possession. If not, why did the government keep the whole management and regulations of the settlement by empresarios in its own lands, but in regard to separate families who came under article 4, relegate to the ayuntamiento the regulation and settlement of the same. In article 3 it is expressly set out that the empresarios shall make contract with the government, but no such clause appears in regard to separate families. In the settlement of such importance as would be one of two hundred families, the government itself proposed to keep the direction. But for settlements of singular families or groups of families of less than two hundred it was left to the ayuntamiento to regulate and manage. If it had been intended that each separate family, or even that each group of families should make direct application to the general government, it would have been expressed in terms in article 4 as explicitly as in article 3.

Our argument is further supported by reference to Sec. 22

the law of 1823, where it is said: "the date of concession for lands is an inviolable law for the right of property and legal ownership." Undoubtedly in its most restrictive sense "to designate the lands," gave authority to the ayuntamiento to locate, point out and put the colonist into possession.

Concession in Sec. 22, evidently refers to designation to be made by the ayuntamiento in the 4th section. No other title to a colonist is referred to in this act. These sections when taken together with other parts of the act evidently meant juridical possession, which completed or perfected titles, and gave to that body not only the right to "*regrant*" but to grant land to colonists in the first place. Concession gave a perfect title. No title in Mexico could be perfect or complete, "no right of property or legal ownership" could exist there without juridical possession. To the colonist that was to be given, by the ayuntamiento. Under the law of 1823, the colonist had no other source or title.

In the case of Malarin *vs.* U. S., 1st Wall., 290, it is said:

"The juridical possession is not designed, merely, to measure, and definitely identify the land granted, as it is claimed by plaintiff, but it was a formal act by which possession was delivered and title passed, and finally became perfect in the grantee. The judge went upon the land and after measuring it, when necessary, to identify the land granted, directed the grantee to enter into possession, which he did, and"

gave evidence of the fact by pulling up grass and making demonstrations as owner of the land.

In Graham *vs.* U. S., 4 Wall., 261, the court says:

"The Mexican law as well as the common law made formal delivery of possession or *livery of seizen* of the property *essential* after the execution of the grant, for the investure of the title."

Van Reynegan *vs.* Bolton, 95 U. S., 35.

As no title could be complete in Mexico without possession and concession being fixed by this law as to "inviolable law for the right of property," it must follow that the concession the colonist obtained was a title and possession he got from the ayuntamiento. From the quotations given above of sections 4, 22, 23, it appears that it was the intention to delegate to the town counsel the power to alienate the title and lands to prospective settlers by grant; and by the language of section 22, where reference is made to said grant as being a concession, it refers to said word as being used in a sense synonymous with the word "designate" as contained in section 4 of said act, and they all contemplated the power to make the grant, is conclusive from the language of section 23, which provides that if, after two years from date of concession, the colonist should not have cultivated his land gotten under the designation in section 4, then that said municipal body shall have power to "*regrant*," which carries with it absolute and uncontradicted power to grant originally.

The points we argue have been settled by good authority.

The Supreme Court of Texas has held that the ayuntamientos, under the law in 1823, had extensive authority in relation to granting and revoking titles to land. In the case of *Heirs of Hollowman vs. Peebles, 1 Tex., on pages 697–698*, Judge Hemphill, speaking of the obligations and functions of the ayuntamientos and referring to the first chapter of the law of the Cortez, June 12, 1813, *Collan de los Decretos, p. 86*, says:

"But in its last section the ayuntamientos are charged, in addition to their other obligations, *with all other subjects entrusted to them by laws, regulations or municipal ordinances.*"

Then quoting Secs. 4 and 23 in the act of January 4, 1823, as above, adds:

"*From these articles there can be no doubt that extensive authority was vested in the ayuntamiento in the issuing, granting and revoking, and regranting titles to land under the colonization law of 1823.*"

This learned judge further refers to the act of 24th of March, 1825, of the State of Coahuila and Texas to determine the power of the ayuntamientos. This becomes important to us when we remember that the power of the respective political authorities, under this act, could make grants only

"in conformity with the existing laws on the subject, *under the conditions that precedings shall be passed to the government for its approbation.*"

We find no such provisions in the law of 1823, hence we concluded that our grant needed no subsequent approval of the government, and that the act of sending it to the departmental governor was useless, unnecessary and void.

"B"—Difference in laws of 1823 and 1824.

The distinctive features of the law of 1824 and the regulations of 1828, when compared with the short, direct and positive terms of the act of 1823 show the ayuntamiento had power to make grants without the subsequent approval of the governor or the provincial deputations. If not so, why was the congress of the nation so particular to embody in the latter law such direct and positive requirements of the kind, as we find therein: that concessions made by the governor should not be made definitely valid unless approved by the departmental assembly? And in case its approval was not obtained the governor was to report to the supreme government for its decision; while grants made to the empresarios were by the 7th regulation not to be held as definitely valid until the approval of the supreme government was obtained. But no such provisions are to be found in the law under which we took our title. It was in accordance with the ordinary policy of the Spanish and Mexican governments to invest the

administration of local affairs to local subordinates, by whom the will of the supreme government was carried into effect in the grant of lands: In the law of 1823 the right to make colonization grants was lodged in the executive and ayuntamientos without any provisions of subsequent approval, but this was soon repealed and supplemented by the law of 1824, giving the power to the governors, with the subsequent approval of the departmental assembly and the supreme government. Both laws were legal, and it was only a question of WHEN AND HOW the will of the executive was carried out. In the one case, by the direction of the law and the will of the executive the ayuntamiento exercised the power to grant absolutely, while in other, the power was lodged in the governors subject to approval. In other words, with the will of the executive, the ayuntamiento, by the act of 1823, was appointed the agent to make colonization grants. It was within the policy of the Mexican government to make grants through the chief executive, either direct or by delegated authority. And this authority was often delegated by the chief executive himself, sometimes by the nation.

This delegated authority was always exercised in Spain or Mexico by the governors, ayuntamientos, pueblos, local commissions, etc., and in each instance it was the act of the chief executive performed through his authorized agents. The laws of 1823 and 1824 make a distinct, positive and different delegation of authority. In the first, with the instructions of the executive, the ayuntamientos were to make grants of land to colonists, while in the other, the power was given to the governors with the provision that no grant was to be definitely valid without the approval of the departmental assembly and the chief executive.

This distinction may be further recognized by examining the law of Coahuila and Texas of March 24, 1825. These and all other laws of Mexico, except the act of January 4, 1823, expressly provide that all grants made by governors or authorized authorities are to be approved by the government. Yet it is held in all such grants that title and possession given under these laws is not defeated by want of approval of the departmental assembly; that nothing short of the negative action or refusal of the chief executive will have the effect of destroying the title received.

Then why is not our title good and perfect, received under a law which required no concurrence or approval of the action of the ayuntamiento, the granting power, or the agent thereof? This proposition is further sustained when we perceive that there is nothing in the act of 1823 or any of the statutes or laws of Mexico, as well as nothing to be found in the proceedings of our title, which authorizes or requires the departmental governor or assembly to act jointly with the ayuntamiento in making our grant.

We admit that if this had been a joint power, being exercised only by one, our grant might be void.

The power the ayuntamiento had was not under statute to be exercised jointly with the governor and departmental assembly.

To require this would have been a repeal of the law, and to have substituted a new one in its place. This could only have been done by the act of the supreme government. No such law or decree to this effect is shown.

The petition was directed to the ayuntamiento, and it alone had the right to determine whether the grant should be made and the title papers issued. This it adjudged affirmatively and issued the grant, made the survey, and put Heath into possession.

If this grant had been made under a special dispatch in which the ayuntamiento, the departmental governor and assembly were to act jointly in making the grant, then a different result would have been had. In such a case an affirmative adjudication could not have been legally made, without the consent of the departmental assembly and governor. But we have no such a record in our case before this honorable court. Our grant was made with authority of law, and cannot be defeated by any unwarranted, unauthorized and illegal requirement of subsequent approval. In our case approval was not required by law, and therefore unnecessary.

U. S. v. *Castellero*, 23 How., 464.
U. S. v. *Osio*, 23 How., 273.

"C." The grant was made to Heath individually and not to the families with him as beneficiaries and for this reason was not an empresario contract. The parties he brought were included as one family, and were referred to only as inducement for the enlarging of the grant.

That the grant was properly made to Heath individually and that the families whom he was to bring, were to take the lands through him and not through the government direct, is clearly shown by the contract and the law. It was said in the decree that the proprietorship was to be in Heath, and that those who were to settle on the Bracito were to contract with him. He was the *proprietary* of this land as William Penn was during the colonial government of Pennsylvania, having the fee and the free disposal of all said lands. *Bouvier's Law Dictionary, p. 588.* This was warranted by the law of 1823. There was not one word in it or in the grant that directs the ownership to be given to the families Heath was to locate. And it is settled there is no limitation in the law against confirming in one final title lands intended for two or more.

White v. *Holliday*, 11 Tex., 304–308—605–614.
Hatch v. *Dunn*, 11 Tex., 708.

The fact that Heath promised to bring to this land thirty families does not make this grant an empresario contract. These families were not to take interest in the land as distinct additional beneficiaries, but were referred to in the petition only as inducements for enlarging the bounty of the government to Heath. His

petition asks for this grant to himself and it is given in such form as not to convey any interest in the land to any other person. It is expressly provided that if any one wishes to settle on the Bracito, he must make arrangements with Heath. From this it was left with him to make such arrangements with the families he brought as would be in conformity to law and the best interests of the parties concerned. Here no beneficiary interest was created by the grant in these families but the fact that Heath was to bring them there as part of his family or servants and over whom he had control with intent to form a colony, gave the ayuntamiento jurisdiction to augment the grant and make it as large as it did. These views are clearly sustained by authority.

Berreyesa v. *Schultz*, 21 Cal., 513.
Ferris v. *Coover*, 10 Cal., 589–592.
U. S. v. *Sutter*, 21 How., 170.
U. S. v. *Weber*, 1 Hoffman, 126.

These were colonization grants made "to the petitioners and other families." In the 21 Cal. case, the father, mother, brothers and one hundred Indians constituted the family of the petitioners, and the petition asked the grant for the benefit of themselves and the persons with them, and it was held:

1st. The petition and report of the secretary upon it showed that the parents, children and brothers were referred to only as inducements for the enlarging of the bounty of the government to the petitioners, and not as distinct additional beneficiaries.

2d. That the recital in the grant did not control the course of the title; that it only disclosed the inducements which operated upon the governor to make the grant, and that the language of the operative clause entirely excluded the idea that any other person than the two Berreyesas who petitioned were to become vested with the title.

3d. That Jose and Sisto Berreyesa, the grantees, were invested by the grant with the full legal and beneficial title to the land, exempt from any trust in favor of the other members of the family.

Again, the grant to the empresarios was not forfeited until the end of twelve years, while the one to the colonist might be in two years. From these provisions it was manifest that the right to grant land was not alone to be exercised by the executive or government, while it is equally clear that by the words of the 4th section "the ayuntamiento may designate the lands," and the language of section 23, "in which case the respective ayuntamiento can grant it to another," it is conclusively proved that the ayuntamiento is the authorized authority referred to.

Here the location of the thirty families was not a condition precedent or subsequent. In this the grantor relied upon the promise of the grantee, the vesture of the title in no way depended

upon its fulfillment or non-fulfillment. This is very similar to the grant made to Arredondo. In that case the petition stated "that as an inducement to the Spanish government to make the said grant to Arredondo and son, they had offered and stipulated to establish on the land two hundred families in the event of said land being granted to them in full dominion and in absolute property; which offer was accepted by the Spanish government, it requiring that the families should be Spanish. The grant was made in absolute property, subject only to the conditions that the grantees should begin their establishment in three years from the date of the grant."

United States v. *Arredondo*, 6 Peters, 696.

This was a colonization grant made upon conditions which were not complied with in fact. Yet it was held by the court that these conditions were subsequent, that the title vested upon the delivery of the possession and as a matter of law such facts were shown as dispensed with the performance and divested the grant of the conditions subsequent. We submit that this is precisely our case, as we will show in our argument on the question of forfeiture. The case of Arredondo was ably argued and carefully considered by the court. It has been affirmed and re-affirmed and is now well established law.

Interstate Land Co. v. *Maxwell Land Co.*, 139 U. S., 569-590.
McMicken, v. *U. S.*, 97 U. S., 204-216.
Hall v. *Russell*, 101 U. S., 509.

Contrary to these and many other decisions, the court erroneously ruled giving as the chief reason for dismissing our petition, "that the power conferred upon the ayuntamiento was to grant lands to families who had emigrated, and who presented themselves for settlement. Absolutely no power was conferred to make grants to individuals who went into the country without families or in advance of them; and that was Heath's condition when the grant was attempted to be made. He had come alone into the country. *Let it be conceded that the body had the power to designate the lands which should be given to him when he should return to the country bringing his families with him, but until that condition should happen there was absolutely no power in the body to confer upon him any rights with reference to the lands*," further suggesting that all Heath obtained was only a privilege of emigrating to the country and settling on the land designated to him, provided there was no change in the policy of the government.

This is not the law. The opposite is the well established principle settled by decisions of the universal practice of the Mexican government under its colonists laws. In Mexico the word family did not mean wife and children only, but included domestics, servants, attendants, etc. *Hatch* v. *Dunn*, 11 Texas, 708.

And it is held, actual residence in the country previous to making colonial grants has never been necessary to the validity of the title under any of the colonization laws. The colonists were allowed a term prescribed by law to comply with the conditions annexed. And lands intended for two or more colonists may be included in one title.

White v. *Holliday*, 11 Tex., 606, 616.

It is clearly settled by high authority that the ayuntamiento having been appointed by the government to determine who were entitled to lands as "colonists," its duties in this respect were judicial and its decision final. It was for them to determine whether Heath possessed the qualifications requisite to entitle him to the bounty of the government, and also whether it was wise and prudent to make this grant, and it is settled that their decision upon the subject is final and can not be reversed by the courts.

U. S. v. *Vigil*, 13 Wallace, 449–451.
Johnson v. *Smith*, 21 Tex., 722–728.
Bowmer v. *Hicks*, 22 Tex., 155–162.
Russell v. *Randolph*, 11 Tex., 460.
Horton v. *Brown*, 2 Tex., 79.
Brown v. *Hicks*, 23 Tex., 156–162.
Byrne v. *Fagan*, 16 Tex., 392-395.
White v. *Burnly*, 20 How., 235.
Choteau's Heirs v. *U. S.*, 9 Pet., 147; affirmed in *McMicken* v. *U. S.*, 97 U. S., 215.
Vance v. *Garland*, 101 U. S., 514.
Marqueze v. *Frisbie*, 101 U. S., 475.

In *Johnson* v. *Smith*, 21 Tex., 722, on page 727 it is said:

"In the case of *Russell* v. *Randolph*, 11 Tex., 460, it was shown that it was the common practice of the commissioner, sanctioned by a high law officer of the government, to issue titles to applicants whose families had not, and were known by the officers not to have arrived in the country."

In affirming this case in *Brown* v. *Hicks*, 22 Tex., 162, the court said:

"A grantee possessed all the requisite legal qualifications to entitle him to the grant, and that the grant itself concludes all after inquiry upon that subject, has been repeatedly decided. This precise question was decided in the case of *Johnson* v. *Smith*, 21 Tex., 722, where it was held that evidence cannot be admitted to prove that the grantee had not brought his family to the country and had not in fact become domiciled here for the purpose of showing that he was not entitled to the grant."

To same effect:

Styles v. *Gray*, 10 Tex., 503.
Hardiman v. *Hobart*, 11 Tex., 656.
Hatch v. *Dunn*, 11 Tex., 708.
Ruis v. *Chambers*, 15 Tex., 590.
Howard v. *Colquhon*, 28 Tex., 136.

It will not do to say that the grants in these cases were made under colonization laws subsequent to 1823, and were therefore not applicable to our case. In *Russell* v. *Randolph*, 11 Tex., 114-468, quoting the case of *Holliman* v. *Peebles*, 1 Tex., 678, which was a grant under the law of 1823, the court said that this case affirms the fact

> " that it was the practice of the government at that time to make grants to colonists whose families were not then in the country. That it was not an indispensable requisite of this law that the families should actually be with the applicants as a condition upon which titles could be given, and that grants thus made were not void either on account of fraud or want of legal authority the family was constructively with him."

While these decisions are not binding, yet they are almost, if not absolutely persuasive, being rendered by an honorable court when the laws were in operation with full knowledge of the facts and surrounding circumstances. This was the practice adopted and the construction placed by the officers of the government upon the law. At this late date the correctness of that construction is not open to revision.

> *Johnson* v. *Smith*, 21 Tex., 727; 15 Tex., 590; 16 Tex., 398; 7 Tex., 384.

This being true, the argument of the learned court fails and there is nothing left except the equally erroneous proposition that, as the town council could not grant lands outside of four leagues, and the lands being beyond that limit, our grant was void. We were surprised at this ruling. It shows a confusion and misunderstanding of the Mexican law and the points in the case. We have always admitted that our lands were without the four leagues from El Paso, but that does not affect the questions in our case. The law of 1823 was the general National colonists' law of Mexico; it dealt with the public lands and not with those of the state or municipalities. What lands belonged to, or whether or not four square leagues were assigned to all Pueblos, is not a question in our case. This question has been recently decided by this honorable court. (See *U. S.* v. *Santa Fe.*)

This statute does not pretend to deal with such lands. If the law gives to the town councils the right to make grants, as we contend it does, it was certainly erroneous to limit that authority to the grant of lands within the four square leagues, as the United States Land Court did do. This law being national and dealing with the public lands of the nation, it was erroneous for the court to rule, " in our judgment the power conferred upon the Ayuntamiento by decree, with reference to foreign emigrants, was simply to allot to them lands within the town grant," and that if the town councils had power to make grants outside of the town grant, then that body could act in making allotments only in quantities prescribed by existing laws and regulations giving allotments

within the town grant. Here the court concedes the power to make the grant as we argued, but because they could not apply this authority to a wrong subject-matter, our petition was dismissed. This law was a law unto itself. The authority given to the Ayuntamiento was not limited or restricted by anything contained in former laws. Under the fourth section the Ayuntamiento, which had the power to grant, was the one nearest to where the land lay; its jurisdiction was not limited by distances, but by circumstances. The jurisdiction of El Paso to make grants under this law of 1823, extended to San Diego, because at that time there were no other organized Pueblos west between there and the Pacific coast. The jurisdiction referred to in Exhibit "A." page 169 of record, and page of argument, means the the right to decide and determine as to the making of grants, and does not mean that the land and all the territory to San Diego belonged to El Paso as a municipal domain or ownership; therefore, the first reason assigned by the court for the dismissal of our petition that our grant was not of the town lands of El Paso, and was therefore void, cannot be sustained. In the court below the learned counsel argues at length, in second point, that:

"*The grant was of the town lands of El Paso, and therefore void.*" In determining the power to grant, the fact that our land was not within the four leagues of El Paso, had nothing to do with our case. Although it was one of the reasons assigned by the court for dismissing claim. It is singular that the learned counsel for the defendant should argue that our title was void because our grant was of the town lands of El Paso, and the court decided that our title was void because the lands were not the town lands of El Paso. The truth of the matter is, that question has nothing to do with the rights of the Council to make grants, the law of 1823 dealing only with public national lands the learned counsel in discussing their first point in the court below, and we presume they will use the same argument here, asserted that the grant to Heath was unlawfully made; that the Ayuntamiento had no authority to make the grant under the law of 1823, for the reasons that as they claim our grant was an empresario's grant and not a grant to Heath as a colonist, as we argue, and in support of all this they allege that Heath directed his petition to the Emperor of the Nation and not to the Town Council of El Paso, and that it was the Executive and not the Ayuntamiento who was asked to concede to Heath's prayer. This proposition runs through the whole of their argument on first point. They say: "Heath's petition is addressed to the Emperor, and properly so under the provisions of the law." We submit this proposition *is false in fact and erroneous as a conclusion of law.* "Your Excellency" does not mean the Emperor or the Executive of the territory, but meant the town council or the chief officer of that body; this is the inevitable conclusion from the grammatical construction of the first sen-

tence of Heath's petition. He says: "I appear before Your Excellency," and not having received any reply to the petition, I laid before the Ayuntamiento, *your predecessor*. Here "predecessor" necessarily refers back to "your excellency." Again, "His Imperial Majesty" are words by which the Emperor is addressed. The Ayuntamiento is called "Its Excellency," and it was resolved to continue the execution of the decree of the 15th instant, made in compliance with the first action of *its excellency*. Surely Heath had a right, then, and did address the Town Council as "Your Excellency," and the learned counsel's proposition that Heath's petition was addressed to the Emperor, and properly so, that it was under Section 3, and not 4, of the law of January 4, 1823, and was therefore an Empresario grant and not to an individual colonist, must fail. They have misquoted and wrongly interpreted the letter and spirit of our grant.

It is argued that the expressions in our expediente such as the promise of Gid to bring to the settlement of the Bracito thirty families of Catholic Christians, that said settlement be annexed to the parish of this jurisdiction, that he would bring stores, ammunition, etc., tends to show that he was asking for a tract of land for the purpose of establishing a settlement and not for the grant of a tract of land to himself individually as a colonist. Now, this must be determined from the law and what was done in the premises. The grant might have been made to Heath and others, but it was not. It is to him individually. Nothing in the papers indicates anything to the contrary. True, he promises to bring to the Bracito thirty families, but this is not a condition precedent. The Nation relied upon his promise in this particular. It is provided that this land at the Bracito is his, and that any one coming to it must make an arrangement with him. These thirty families had no ownership in this land except what they would get from Heath. His promises might have been an inducement for the Council to make the grant as large as it did, but a fulfillment of these promises was not made a condition precedent. When he promised he required expressly that the land be given to him, not to himself and others, and this is the way the expediente was executed. Just precisely as it was in Arredondo's case.

"There, as an inducement to the Spanish Government to make a grant to Arredondo and son, they offered and stipulated to establish on the land two hundred families, in the event of the said land being granted them in full dominion and absolute property; which offer was accepted by the Spanish government, it requiring that the families should be Spanish. The grant was made in absolute property (as in our case) subject only to the conditions that the grantees should begin their establishment in three years from the date of the grant."

U. S. v. *Arredondo*, 6 Peters, 697.

"D."

Sections 8, 9 and 22 authorized the Ayuntamiento to make the grant to Heath as large as it did, and the land conveyed was not a "float" but a title in fee.

THE AMOUNT OF LAND TO BE GRANTED NOT LIMITED BY LAW.

It can not be said that the authority of the Ayuntamiento was limited as to the land it gave to a colonist. The maximum amount to be given to a colonist was not as under other laws limited, but the minimum quantity was; the amount of land given might be augmented if deemed proper, agreeably to the conditions and circumstances of the colonists. Sec. 9.

Therefore, there was nothing in this law to prevent the town council from giving Heath himself, as a colonist, one or more haciendas. They alone were to judge of the merits, conditions and circumstances of Heath as a colonist and their decision can not be inquired into. See page 57 of this argument.

The defendants say that Heath applied for and the Ayuntamiento intended to give one hacienda, while the land claimed is five haciendas, and that the petition does not show authority to make such a large grant.

We submit that neither the 8th article nor any part of the law of 1823 limited the quantity of land to be given to a claimant by the council. We deny that Heath asked for or that the Ayuntamiento granted him a hacienda only. True, in some parts of the proceedings they may use the general term hacienda, but there was no uncertainty as to the granting part of the contract as to what was conveyed. It was a tract of land taking the head of the Bracito acequia as the central point of a square, two and a half leagues from the river, and the same on the sides formed by the square, that is, a square of five leagues or twenty-five thousand varas on a side. See Exhibit A, page ~~13~~ 6

This was followed by survey and possession according to this decree, accompanied with a map, all of which was affirmed, approved and adopted in the subsequent proceedings, showing just what the Ayuntamiento granted or intended to grant to the said Heath. The concession and survey agree, and fix the amount of land he took by the grant.

Hacienda, in its general meaning, is a farm, a residence, an "estate." (Blackmar's Spanish Institutions of the south-west.) Therefore the grant made is not limited to a hacienda, simply by the use of the word, when the judicial possession, the survey, courses and distances, corners and natural boundaries all show that the council intended to and did grant more than one hacienda. Boundaries and actual locations when in conformity to the particular descriptions of the deed fix the amount of land granted. Again, a general description by the use of a word or phrase, as in this

case, hacienda, must yield to the particular descriptions—"a square of five leagues on a side, with the head of the Bracito acequia as the central point." If error exist in courses and distances and other descriptions in a grant, they must give way to monuments and physical boundaries.

Higueras v. *U. S.*, 5 Wall., 827.

Therefore if the land thus described should be five haciendas instead of one, we take what is there given by our deed and judicial possession, and are not limited to one single hacienda by the accidental use of the general term, which is not a description of the granting part of our title. The point we argue is clearly sustained by authority. In a recent case, Justice Miller said:—"The whole of this subject is very well considered and explained by Justice Field, in the opinion of this Court, in the case of *Hornby* v. *United States*, 10 Wall., 224. He says:

"As we have had occasions to observe in several instances," (referring to *Higueras* v. *U. S.*, 5 Wall, 828; *Alviso* v. *United States*, 8 Wall., 339) grants of the public domain of Mexico made by governors of the Department of California were of three kinds. 1st, grants by specific boundaries where the donee was entitled to the entire tract described. 2d.—Grants by quantity as one or more leagues situated at some designated place or within a larger tract described by out boundaries, where the donee was entitled out of the general tract only to the quantity specified;—and 3d—Grants, of places by name, where the donee was entitled to the tract named according to the limits as shown by its settlement and possession or other competent evidence."

It is entirely clear that the grant to Beaubian and Miranda was a grant of the first class by specific boundaries, where the donee was entitled to the entire tract described. *There is nothing in the language of the Grant, nor in the petition, nor in anything connected with it, nor in the act of judicial possession, to indicate that either governor Armijo or Beaubian and Miranda, or the officers who delivered the judicial possession to them, had any idea or conception that the grantees were not to have all the land within the boundaries established by that judicial possession.* Hence the idea of counsel that there were only twenty-two square leagues, or 97,4248 acres granted within this great boundary is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger outboundary."

Maxwell Land Grant Case, 121 U. S., 325–372.

Clearly our case comes within the first class of grants, being one of specific boundaries with marked, designated and fixed lines and corners, we "*are entitled to the entire tract designated.*"

That the council had authority to make the grant this large is fully sustained by sections 8 and 9 of the law. That this was a matter of discretion over which it was the sole judge, and into which this Court can not inquire, is fully sustained by authority. In Arredondo's case, 6 Peters, page 747, the court says:

"It has been objected to the validity of the grant that it exceeds the quantity authorized by the laws of the province. That he (the intendent) had power to make the grant, the terms and extent of which were within his discretion, the proper exercise of which this Court has neither the power nor right to judge."
And authorities cited above.

Again in the case of *U. S.* v. *Pico*, 5 Wallace, 536–539, Justice Field used the following language:

"Were there any doubt of the intention of the government to cede all the land contained within the boundaries designated by him it would be removed by the judicial possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the land granted by the appropriate officers of the government specially designated for that purpose, and has all the *force and efficacy of a judical determination. It bound the former government and is equally binding upon the officers of our government.*"

Affirmed in *More* v. *Steinback*, 127 U. S., 70–9.
Van Rynerson v. *Bolton*, 95 U. S., 33-36.

The authority of the council, Art. 9, to "augment said portions of land as may be deemed proper agreeably to the conditions and circumstances of the colonists," presupposed the authority to judge of the qualifications of the applicant, and its judgment and action is binding. That was a question confided by the law to the judgment of the council in this case, and it is unquestionable that its decision upon it is not now subject to revision by this court. With as much propriety might we sit here to revise the action of the authorities in granting a league rather than a labor under the 14th Article of the law, or to inquire into the sufficiency of the evidence upon which the empresarios or commissioners acted in making a grant in any case. It is scarcely necessary to say that such inquiries would be as unprecedented as they would be unwarrantable.

Jenkins v. *Chambers*, 9 Tex., 167–228–9.
Choteau's Heirs v. *U. S.*, 9 Pet., 153–4.
United States v. *Arredondo*, 6 Pet., 729.

Could there possibly be any shadow of doubt as to whom the Bracito was granted and just what land was conveyed, the survey and possession given fixes the matter. Under the Mexican law when the survey took place accompanied with possession, title immediately accrued.

Rutherford v. *Green's Heirs*, 2 Wheat., 196.
Gonzales v. *Ross*, 120 U. S., 626.
Fremont v. *U. S.*, 17 How., 541–2.
Waterman v. *Smith*, 13 Cal., 414.
Hancock v. *McKinney*, 7 Tex., 383.

Delivery of judicial possession had a double operation. First, to make a formal delivery of seizure of the property, and second to measure off and designate the specific quantity and establish its

boundaries. These proceedings involved a definite ascertainment of the land to be delivered, and for that purpose a survey and measurement; in other words, a locating of the land.

Carondelet v. *St. Louis*, 1 Black, 179–189.
Van Reynagen v. *Bolton*, 95 U. S., 35.
U. S. v. *Borsdire*, 11 How., 86–87–90.
Huse v. *Clark*, 18 Cal., 574; 21 Cal., 579.
U. S. v. *Choteau's*, 9 Peters, 147–154.

After possession delivered, what was previously a grant of quantity became a grant of a specific tract.

Graham v. *U. S.*, 1 Wall., 259–261–2.
Malarin v. *U. S.*, 1 Wall., 289.

We submit that by our expediente, by the map or draft, and by all the proceedings in the case, placing us in full possession of the whole survey actually made of a square piece of ground of five leagues on each side, with the head of the Bracito acequia as a central point, we took title to all land thus surveyed, no matter if it was one or five haciendas. But the learned gentlemen argue in this second point, "assuming the grant to have been a valid grant, it was only for an hacienda." For that reason our grant is a "float." They do not say this in words, but it is what their argument means. It would have been too absurd to have used this term. They say our grant is not one of specific boundaries, but one of quantity, lying within a larger tract described by out boundaries, what in law is known as a "float." The gentlemen forget that the quotation from Exhibit A, "they may locate their hacienda" was used by the Council in their decree before the land was surveyed and located, and does not apply to a location to be made in the indefinite future of a hacienda within the out boundaries of a larger tract. Nothing in our grant shows that an hacienda was to be surveyed off in the future by the officers of the vicinage, and the surplus reserved for the use of the Nation. Mexico never made two surveys and gave two judicial possessions.

Frasher v. *O'Connor*, 115 U. S., 102–107.

It is absolutely certain that the term hacienda was used in its general sense as a farm or possession. There was nothing in the law of 1823 that limited grants to colonists to one hacienda; the grant could embrace five or more. The concession, possession and survey fixes the land Heath got. Exhibit A. "The head of the Bracito acequia shall be the central point of the square of the said tract; that is to say, two and a half leagues from the river, and the same on the side formed by the square." Exhibit H. "The Bracito tract to be five leagues of each course, the whole composing an hacienda." This is the land granted and into *full possession of which Heath was placed*, and yet the learned counsel argue that our grant was not one of the first of the three kinds of Mexican grants, namely, grants by specific boundaries, where the donee

is entitled to the entire tract, whether it be more or less; but that it was of the second kind, grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, when the donee is entitled to the quantity specified and no more; or in other words that Heath did not get the five leagues with the head of the Bracito as its central point, which was surveyed, marked, designated and set apart to him and *into full possession of which he was placed*, but only got the promise of the Mexican government to give him an hacienda or 21,140 acres to be located somewhere within the vicinity of the Bracito acequia, this never having been done and the Mexican government having subsequently located three grants at the Bracito, the latter had a prior or better right than Heath, although his title might have been made according to law. The counsel quote several cases with which we have no controversy as to the points of law decided, we claim they are not applicable to our case. We admit that they and other decisions do hold that a grant of a quantity of land, not fixed, located, surveyed or set apart, or described further than being within a larger tract, described by what are called out boundaries, may be postponed or defeated by a subsequent grant, survey, location and possession of the same land to another. We submit our grant was not one of this kind. It belonged to the first class of Mexican grants. Its boundaries were specified, definite and certain. Its central point was fixed, so were all its lines and corners, a square of four leagues on a side. Read Exhibit G, copy of proceedings of possession to see what land Heath took (page 160 of record, and of our argument.) The commission proceeded to this place, where "in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid was to be placed," whereupon a tree was cut: "Haza de Dr. Juan Gid," farm or possession of Juan Gid. They then proceeded to make the survey, establishing marks, stones and corners at different points, and when finished Juan Gid was asked "whether he was satisfied *with the whole survey made of the land into full possession of which he was to enter under the colonization laws.*" And then a map was made and attached as a part of the expediente showing the central point, lines, corners, etc., of the survey. and yet it is argued that this grant is a float, and can only be located by this court on land in the out boundaries "not subsequently granted or otherwise disposed of by the Mexican Government and that of the United States." Surely the principles invoked and the decisions quoted do not apply to our case. A grant fixed, marked, located and designated like ours was, can "float" nowhere except in the vivid imagination of the learned counsel. The learned counsel are mistaken in denying that our case does not come within the first class of Mexican grants, and in stating "that this grant was of the second kind admits of no dispute"? Did the grant not have a central point and "specific boundaries." Then under the decision they quote, why is not the donee "entitled to the entire

tract, whether it be more or less," than a hacienda? In all Mexican grants the question as to whether it belongs to the first or the second class; a fixed survey or a float, must be determined from the words of the grant and the possession given. All the authorities sustain this proposition. In the case of *Henshaw* v. *Bissell*, 18 Wallace, 262, it is said:

"With the breadth of the tract stated, the quantity limited, the southern and center lines designated, all the essentials are given to a complete identification of the land. *A grant of land thus identified, or having such descriptive features as to render its identification a matter of absolute certainty entitles the grantee to the specific tract named.*"

In the case of *Miller* v. *Dale*, 92 U. S., page 478, the court, commenting upon the case of *Henshawe* v. *Bissell*, said:

"The question there is not as to which of two floating grants carried the premises, only one of the grants then under consideration was floating. The other grant had specific boundaries, or such descriptive features as to render its limits easily ascertainable. And the court held that the right of the grantee to the land thus designated could not be interfered with by the donee of a floating grant. *A grant of that specific description necessarily carried the land described, unless appropriated by an earlier grant; and no subsequent location of a floating grant upon the premises could impair the title.*" *In certain parts of one of the cases quoted by the counsel, page 12 of their argument, it is said: "It is entirely clear that the grant to B. and M. was a grant of the first class by specific boundaries where the donee is entitled was the entire tract described. There is nothing in the language of the grant, nor in the petition, nor in anything connected with it, nor in the act of judicial possession, to indicate that either Governor Armijo or Beaubian and Mirando, or the officers who delivered the juridical possession to them, had any idea or conception that the grantees were not to have all the land within the boundaries established by that juridical possession. Hence, the idea of the counsel that there were only twenty-two square leagues or 97,624 acres granted with these great boundaries is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger boundary.*"

Maxwell Land Grant Case, 121 U. S., 325–372.
U. S. v. *Pico*, 5 Wall., 539.

It cannot be denied but that the Council intended to give to Heath the land surveyed to him—a square piece of land of five leagues on a side, into full possession of which he was placed, no matter if they might have erroneously called it an hacienda. This is what was done, as well as what was intended. Had they been locating a mining claim, it could not have been done with more certainty and exactness. Although mining claims must be distinctly marked, it is held: "The law is certainly complied with whenever stakes and monuments are placed upon the ground that the boundaries can be traced without any practical difficulty. The

object of the law in requiring the location to be marked on the ground is to fix the claims, to prevent *floating or swinging*, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.

Book v. *Justice Mining Co.*, 58 Fed., 106–114.
Gleson v. *Mining Co.*, 13 Nev., 442.

"E." As matter of fact and law our grant was made with the knowledge, acquiescence and instructions of the chief executive of Mexico, and the grant itself is *conclusive evidence of this*, and is also *prima facie* evidence of the authority of the Ayuntamiento to make the grant.

That the executive had knowledge of our grant, acquiesced in and confirmed the same, and that the Ayuntamiento made the grant to Heath under the law of 1823, with the knowledge and instructions of the executive, is abundantly shown by our title papers, and what is alleged therein must be taken as true. (See authorities hereafter.)

Heath's petition shows that on December 28th, 1822, he had applied for a grant of the same land, which application was sent December 27th, 1822, to His Imperial Majesty by the previous ayuntamiento, and that as the same had not been returned he would apply *de novo* direct to the ayuntamiento under the law of January 4th, 1823, repeating his former petition. And it further shows that when he subsequently inquired of the ayuntamiento what had become of the former proceedings (see record of April 3d, 1823, page 12), it was answered to him that there had been received no direct reply. But that the government of the province, through Captain Jose Antonio Viscara, civil and military chief, in his official communication of the 2d of March, transmitted and commanded to be published the decree of the 4th of January, of the present year, evolving from the organized national junto, and sanctioned by His Imperial Majesty. He was directed to apply again for the land he wanted to possess. This was done, followed by the grant we present. Here, then, we have the fact that Heath applied first for the land in December, 1822, to the chief executive, that his application being sanctioned in all its parts by the ayuntamiento, was, as required by the laws as they existed, forwarded to the executive to make the grant, A new law on the subject of colonization being enacted soon after, Heath's petition was not acted upon, and the answer received by the ayuntamiento was to publish and carry out the law, or in other words: make the grant to Heath yourselves, under and by virtue of this decree, January 4th, 1823.

Again this law itself shows that the executive ordered "all tribunals, judges, chiefs, governors and all other authorities to

comply with this decree, and cause it to be complied with in all its parts."

Rockwell's Spanish and Mexican Laws, 620.

Here, then, we have an application by Heath to the executive for this land, made in 1822, under the law as then existing, before definite and complete action could be had thereon a change in the law occurred, followed with correspondence on the subject. This gave the executive knowledge of his application, and what occurred afterwards must be considered in that view. Both the Executive and the Provincial Governor had notice of Heath's application for this land for three or four months, a new law being enacted in the meantime they sent it to the council of El Paso with instructions to act in the premises. We submit that the fact of Heath's first application not being rejected, nor acted upon before passage of the law of 1823, when followed with the general order of the executive to councils and other authorities "to comply with this decree and cause it to be complied with," and with the letter of Captain General Jose Antonio Viscara, civil and military chief, under the instructions of his Imperial Majesty, directing the council to publish and carry out the decree of January 4th, 1823, by making the grant to Heath itself was virtually, if not an unconditional approval of his petition. It is not necessary for us to show a higher or better authority than this. The Ayuntamiento having acted, neither the Mexican nation nor its successor, the United States, can now say the grant is void, unless the grantee shows that it had definite and particular instructions from the the executive to act.

That the grant was made with the necessary instructions is sustained by many decisions, for the reason that the acts of officers purporting to be exercised in an official capacity, are not to be presumed to be usurped, but a legitimate authority previously given or subsequently ratified. Grants when made are supported with presumptions; the first, that instructions were given, and second, that subsequent approval followed.

U. S. v. *Arredondo*, 6 Peters, 691–727.
Delassus v. *U. S.*, 9 Pet., 117.

" No principle can be better established by authority of this Court than that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power. The principle on which it rests is believed to be too deeply founded in law and reason ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law takes on himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud. *8 Pet., 452-5, 464; 9 Peters, 134, 734-5; 6 Peters, 727, and cases cited; 10 Peters, 331.* The same rule applies to the judicial proceedings of local officers, to pass the title of land according to the course and practice of the Spanish law in that province. *8 Peters, 310. When the act done is contrary to the*

written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motive set out therein, and according to some orders known to the king and his officers, though not to his subjects. 7 Peters, 96; 8 Peters, 447, 551-6. And courts ought to require very full pooof that he had transcended his powers before they so determine it. 8 Peters, 464; 9 Peters, 734."

Strothers v. *Lucas*, 12 Peters, 410–438.

If an act to be done by an officer whose duty it is to judge of the performance and rectitude of the steps which are to precede it, the doing of the act is a determination and judgment that the precedent steps have been performed, and were performed in good faith. The act is *res adjudicata* of the preliminary and precedent steps.

2 U. S. Cond. R., 291.
Horton v. *Brown*, 2 Tex., 91.

"The grant is evidence of the construction by the executives who made the grant, and it is well established that the construction of their powers and the laws which conferred them, adopted and acted upon by the former authorities of the country, must be respected, unless it is clearly shown that they have exceeded their powers or have acted in manifest contravention of the law. (*Jenkins* v. *Chambers*, 9 Tex., 167.) *The law was susceptible of two constructions, and the officer whose function it was to act under the law having decided, his decision could not now be disregarded, without establishing a principle which might strike deeply at the validity and security of the land titles of the country.*"

Ruis v. *Chambers*, 15 Tex., 586-590.
State v. *Gray*, 10 T., 503.
Hardman v. *Herbert*, 11 T., 656.
Hatch v. *Dunn*, 11 T., 708.
Johnson v. *Smith*, 21 T., 722.
Burns v. *Hicks*, 22 T., 155.
Howard v. *Colquhon*, 28 Tex., 134.

"Papers translated from a foreign language respecting the transactions of foreign officers, with whose powers and authorities the court was not well acquainted, should be carefully examined before the court pronounces that an officer holding a high place of trust and confidence has exceeded his authority."

U. S. v. *Percheman*, 7 Peters, 52-94.

"A grant or concession made by that officer who is authorized to make it carries with it *prima facie* evidence that it is within his powers; no excess of these or departure from them is to be presumed; he violates his duty by such excess, and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it."

"If it was not a legal presumption that public and responsible officers claiming and exercising the rights of disposing of the public domain did it by the order and the consent of the government in whose name the acts were done, the confusion and uncertainty of acts and possessions would be infinite."

The principal of law has been applied to many colonization grants made under the laws of 1824, which provided that certain grants were not valid "without the PREVIOUS approval of the supreme general executive power."

In many cases, although no such previous or subsequent approval was shown, the courts of California and the United States have always sustained the same, frequently holding that the presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it. Under the Mexican law no method of expressing the executive will was provided; it was in different ways—circulars not published, private communications, personal instructions to the officers themselves. This being true it would be impossible, tedious and unprofitable to attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish and Mexican governments on the subject.

It is sufficient for such cases that the archives of the Spanish and Mexican governments show that such power has been exercised by the governors, town councils, etc., and that such grants have been confirmed and held valid by the Mexican authorities.

Public acts of public officers properly to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

U. S. v. *Peralta*, 19 How., 343.

The court said in case of *U. S.* v. *Clarke*, 8 Peters, 451:

"A grant made by a governor, if authorized to grant land in his province, is *prima facie* evidence that his power is not exceeded. The connection between the crown and the government justifies the presumption that he acts as according to his orders. Should he disobey them, his hopes are blasted as he exposes himself to punishment. His orders are known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title."

"*Prima facie* the governor of California under the Mexican dominions had the power to make the lease or grant set out in the bill under the general doctrine that an officer will not be presumed to have exceeded his authority, especially the officers of a foreign government. If there are any facts or reasons to overcome this presumption they should be shown."

Den v. *Den*, 6 Cal., 81.
Vanderslice v. *Hanks*, 3 Cal., 28.
Hart v. *Burnett*, 15 Cal., 530.
Payne v. *Treadwell*, 16 Cal., 221–6.
White v. *Moses*, 21 Cal., 34–40, 41.

But the defendants claim that these authorities are not applicable to our case, that they have been overruled and a new doctrine announced holding that no presumption arises from the issuing of a grant that the officer issuing the same had authority to act, relying upon the cases of *U. S.* v. *Cambuston*, 20 How., 59; *Fuentes* v. *U. S.*, 22 How., 460.

True in U. S. *vs.* Cambuston, presumptions of the existence of power, etc., in respect to Mexican titles since the act of August 18, 1824, are said not to be necessary or admissible. That the authority to make the grant must be gathered from the law itself and is not to be presumed. In these cases there were no Spanish records of the grant sought to be confirmed. The court held that under the law of 1824, grants were to be made in a certain mode and manner, and according to certain prerequisites. That the grant itself must state that it was made in exact conformity with the provisions of the law, and that there must be a record of the whole proceeding. The court further said, as there was no evidence of the observance of any of the preliminary steps made requisite by the act of 1824 to guard against improvided grants, and as they were required to be made an essential part of the record of title, there being no evidence of such record, the grant should not be confirmed.

U. S. v. *Cambuston*, 20 How., 63.

These authorities do not militate against the propositions we argue, nor reverse the decisions we rely upon. We admit that if an officer had no authority to issue a patent or grant this may be shown in law or equity. The grant is only *prima facie* evidence of the power exercised. We further admit, that when there is no record showing a compliance with any of the preliminary steps made requisite by the act of the Mexican congress of 1824 to a grant of the public domain that there may not be a presumption that these preliminary proceedings were complied with for the reason they are and must be under the act, part of the record. This is all the cases relied upon by defendants hold. They are rendered under the law of 1824, and applicable to its construction and particular provisions and have no application to the particular point in our case. Here it is provided by the law of 1823 that the ayuntamientos, *in conformity with the instructions of the executive* may make certain grants we contend that a grant issued under this law is conclusive evidence that the authority issuing the same had the necessary executive instructions.

That every prerequisite had been performed is an inference properly deducible from the existence of the grant itself. If an order or any instructions whatever from a higher officer to the authority making a grant is necessary, the courts are bound to presume that such order or instructions were given.

Minter v. *Crommelin*, 18 How., 87–8–9.
Bagnell v. *Broderick*, 13 Peters, 450. Affd. in
Redfield v. *Parks*, 132 U. S., 245.

U. S. v. *Arredondo*, 6 Pet., 730–1.
Polk v. *Wendell*, 9 Cranch, 98–9.
Polk v. *Wendell*, 5 Wheat., 304.
Smelting Co. v. *Kemp*, 104 U. S., 636, 646.
Hoofnagle v. *Anderson*, 7 Wheaton, 212.
Edwards v. *Rolley*, 31 Pacf., 367.
Easton v. *O'Reily*, 63 Cal., 309.
French v. *Fyan*, 93 U. S., 169.
Jim Silver Co. v. *Campbell*, 135 U. S., 296.
Quinn v. *Chapman*, 111 U. S., 445.

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Section 4 is not an inhibition against the ayuntamiento granting lands without executive instructions. It does not say whether they shall be in writing or oral or that there should be further instructions than what are given in the law itself. The words are "*in conformity with the instructions of the executive.*" We therefore say *that the* issuance of our grant is conclusive. Instructions of emporer were often known only to himself and those to whom given and hence not subject to proof, but the well established rule in judicial proceeding of local officers to pass title to land in Spain and Mexico is to hold that all acts done by such officers even though contrare to the written orders of the king were done on the motives set out therein, and according to some orders known to the king and his officers, though not to his subjects.

Strothers v. *Lucas*, 12 Peters, 410–438.
U. S. v. *Clarke*, 8 Peters, 451; 7 Peters, 96; 9 Peters, 734.

We submit there are no cases that deny the proposition that there is a distinction between the want of power to make a grant and the proper exercise of all the incipient steps in perfecting the same. The issuance of a grant is evidence of both *prima facie* of the authority of the officer to make the grant and *conclusive evidence* that all previous steps were regularly taken to justify the making of the grant. (See authorities above.)

The point we agree has been sustained by high authority and reaffirmed in well considered cases.

"A patent is the completion of title, *and establishes the performance of every prerequisite. No inquiry into the regularity of these preliminary measures which ought to proceed it is made in a trial at law!*"

No case is shown that it may be impeached at law for fraud, not legal and technical, but actual and positive fraud in fact committed by the person who obtained it, and even this is questioned.

Stinger v. *Young*, 3 Peters, 340.

"It is not doubted that a patent appropriates the land. *Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date and has always been held conclusive against all whose rights did not commence previous to its emanation.*"

Hoofnagle v. *Anderson*, 7 Wheaton, 212.

"The testimonio is the final title, and all inquiry as to the proceeding of the officers anterior to the issuance of the grant is precluded where it appears, as in this case, the officer had authority to make the grant and no fraud is charged on the part of the grantee. All the proceedings necessary to the grant are conclusive, *Stinger* v. *Lessee of Young*, 3 Pet., 32; *U. S.* v. *Arredondo* 6 Pet., 729; *Brown* v. *Jackson*, 7 Wheat., 218; *Ward* v. *McKinney*, 25 Tex., 258-266."

"A legal presumption arises in the issuance of any public grant that all preceding acts necessary to give it legal validity have been done before it is issued *and that if there have been any irregularities committed by the officers of the government prior to the grant, the government and not the individual must bear the consequences resulting from them.*

U. S. v. *Arredondo*, 6 Pet., 730–1; 5 Wheat., 304.
U. S. v. *Clarke*, 8 Pet., 436.
Delassus v. *U. S.*, 8 Pet., 134.
Vorhees v. *U. S. Bank*, 10 Pet., 478.

The only point ruled in the case of *Minter* v. *Crommelin*, 18 How., 89, was that a patent is conclusive that an order of the secretary, which was a necessary previous step, had been given. The state court pronounced the patent to be void for want of authority in the officer of the United States to issue it because the record did not show that the order from the secretary to the register had been given. The Supreme Court, by an unanimous opinion, reversed the judgment. Holding:

"*The rule being that patent is evidence that all previous steps had been regularly taken to justify making of the patent, and one of the necessary previous steps here being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it. We are bound to presume that the order was given.* That such is the effect, as evidence, was adjudged in the case of *Bagnell* v. *Broderick*, 13 Peters, 450, and is not open to controversy anywhere, and the state court was mistaken in holding otherwise."

Affirmed in *Randolph* v. *Parks*, 132 U. S., 245.

Smelting Co. v. *Kemp*, 104 U. S., 636, affirms this point, using the same language.

The court on pages 645-6 further said:

"If the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualifications that when the authority depends upon the existence of particular facts, *or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decisions.* The general doctrine declared may be stated in a different form, thus: A patent in a court of law is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land in that court the

patent is unassailable former errors of judgment. Indeed the doctrine is as to the regularity and validity of its acts. when it has jurisdiction goes so far that if in any circumstances under existing law a patent would be held valid it will be presumed that such circumstances existed," affirmed in *Steele* v. *St. Louis Smelting Co.*, 106 U. S., 454; *Oliver* v. *Pullman*, 24 Fed., 127–8.

It is clear the cases of Cambuston and Fuentes do not overrule *Minter* v. *Crommelin* and kindred cases. Minter is affirmed and reaffirmed, while Cambuston is limited, explained and modified. When applied to the act of 1824, and its particular provisions and to grants, the genuineness of which is denied, and no copies of said grants are to be found on the record, it may be good law.

"The several cases cited by counsel, where the omission of proceedings usually taken in obtaining concessions of land, are noticed and made grounds of objections to a confirmation, have no application. They are cases where the grants produced were *unaccompanied by any archive evidence*, and the attempt was made to uphold them by evidence of the recollection of witnesses. *Thus, in the Cambuston case, 20 How., 59, the alleged grant produced was unknown to any person besides the grantee and an interested party until July, 1850, although bearing date in May, 1846, and no trace of its existence was found iu the archives of the country.*"

Hornsby v. *U. S.*, 10 Wall., 225-241.

"In this and Cambuston case, the want of genuineness of the concession was proved, but in all cases where it was not attacked, the presumption that all necessary previous orders were given, was conclusive."

We have no controversy with the law as stated in *Fuentes* v. *United States*, 22 How., 443–459. It affirms the cases of Peralta, 19 How., 343; Delassus, 9 Peters, 117–133; Arredondo, 9 Peters; Bagnel, 13 Peters, 437, and *Minter* v. *Crommelin*, 18 How., 88, where it was held that a concession or deed being regular in form, carried *prima facie* evidence that it was within the power of the officer to make it, and *that no excess or departure from instructions should be presumed*, and that he who alleges that an officer intrusted with an important duty has violated it must show it, *and that the courts were bound to hold that all orders or instructions, if any, necessarily coming from higher authority, had been given prior to the grant.* As said by Chief Justice Marshall:

"These principles are too deeply founded in reason and law ever to be successfully assailed."

U. S. v. *Clarke*, 8 Pet., 453.

The court, on page 460, 22 How., said:

"It is not, however, to be supposed that no title in California can be valid, which has not all the preliminary requirements of the act of the Mexican Congress of 1824, and of the regulations of 1828. But, if none of them are to be found in the archives, and it can not be established by proof that they are registered there, this court will not presume that they were preliminary to a grant."

Again, on page 459, affirming Peralto, 19 Howard, 343, and like cases, said:

"The decision there is that when a claimant of land in California produced documentary evidence in his favor, *copies from the archives in the office of the surveyor general*, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There the authenticity of the documents was admitted, and the validity of the petitioner's title was not denied on the ground of any want of authority of the officers who made the grant. This court then said, that the public acts of public officers imputing to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified."

We beg the court to notice the accidental misstatement of Judge Wayne in the case of *Fuentes* v. *U. S.*, 22 How., 451, where he says that

"The authority of the officer who made the grant in Peraltes case was

In some recent opinions, the cases of Polk's lessee vs Wendall 5, Wh. 304, Smelting Company vs Kemp 104 U. S. 636 and Minter vs Crommelin 18, Howard 9, have been exhaustively reviewed and strongly affirmed, holding that the execution of a deed is a final act and when done by an agent of the government, and is duly signed, sealed and delivered, not only operates to pass the title, but is in the nature of an official declaration of the government that all the requirements preliminary to its issue have been complied with; that this presumption is conclusive and can not be inquired into except for fraud. That no one who is a stranger to the title or does not claim under the same deed can call in question the validity or regularity of such conveyance, or by subsequent intrusion upon the possession acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. That if the authority of the Ayuntamiento depended upon the existence of certain facts it was its duty to ascertain whether these facts existed; that its determination is evidenced by its deeds and possession given, and the same is conclusive against any attack at this day.

Ming vs Foote, 23 Pacif. 515.
Green vs Baker, 47 Nebr. 934. 66, N. W. 1032.
Taylor vs Winona etc. Railroad Co. 47, N W 553-4.
Chever vs Horner, 11 Colo. 72, 17 Pacif. 495.
Anderson vs Bartels, Colo. 256, 3 Pac. 235-9.

language of the law of 1823, and grants made under that law have always been sustained by Mexico and the United States.

FOURTH. *Ponce de Leon, a high Mexican official, commissioner and political chief of the Borbos District, in proceedings to perfect the title of Juan Antonia Garcia in 1849, referring to this grant, certified that Juan Gid asked for and received a grant of land from the Mexican authorities.*

FIFTH. *The departmental assembly by its action of June 17, 1823, directing the Ayuntamiento of El Paso to notify Heath not to bring his families to Mexico in order to avoid damages Heath could recover if the families should come and settle, admitted the authority of the said Ayuntamiento under the law of 1823, to make the grant it did.*

It may be that when want of authority to make a deed does clearly appear in the record, that this authority cannot be supplied by the presumption of its validity which arises from the issuance of the deed itself, but we do assert that when there is a doubt as to the meaning or interpretation of a Spanish law, the first duty of the court was to ascertain what was the views and ideas of the Mexican people at the time concerning the law. Did they believe that the words of this act gave the power to make the grant, then that power should not now be denied by the courts of America. If, as the record shows, a similar grant was made by the town council to Jesse Lerma, a colonist, for 400,000 acres of land, and this grant was afterwards sustained by the Congress of Chihuahua as a valid legal title, then our grant should likewise be sustained by our courts. Add to this the facts that the power to make grants under the law of 1813 was similar to that of our act, and that Ponce de Leon, in 1849, swore that Heath had received a grant from the Mexican authorities, that the Departmental Assembly admitted this authority, but criticised its advisability, we have full, complete and ample Mexican authority to support this grant. The court did not attribute to these facts the important consideration they should have received, and wrongfully gave to the Mexican laws a more strict construction than they received from the Mexican authorities who were intrusted with their execution and enforcement. This is not the construction that has been applied to such laws by this honorable court where microscopic objections are not urged, but a liberal interpretation given.

Honsby v. *U. S.*, 10 Wall., 237.
U. S. v. *Moreno*, 1st Wall., 404.
U. S. v. *Auguesola*, 1st Wall., 352–358.
City of Brownville v. *Basse*, 36 Tex., 461–502.

The first proposition stated above is argued on page .

Second Proposition. The law of January 4, 1823, being repealed soon after, and never having been published and promulgated anywhere except at El Paso Del Norte, was therefore never in force in any other part of the Republic of Mexico. For this reason it is impossible to find any other grants made under the law except the one to Jesse Lerma, August 15, 1823. On this day Jesse Lerma, a colonist, petitioned the Ayuntamiento of El Paso Del Norte to grant him 400,000 acres of land promising "to colonize it with the families which desire to accompany him thereto." This petition was allowed, a commission appointed, and Lerma put into possession of the land by the town council of El Paso. In 1828 certain parties denounced Lerma's land for want of cultivation and settlement, and on May 12th of that year he appealed to the Government of Chihuahua for the protection of his vested rights. The matter was laid before the Congress of that state and his title was sustained and confirmed—the states having jurisdiction of the public lands at that time under the law of 1824. This confirmation of the Congress of Chihuahua in 1828 of Lerma's grant made for a larger tract of land than ours, four months afterwards, and by the same authority which gave us our title, is persuasive, if not conclusive evidence of the right and power of the Ayuntamiento of El Paso to make grants under the law of 1823.

Brownville v. *Cavayos*, 100 U. S., 138-142.
Hardiman v. *Herbert*, 11 Tex., 655-660.

Recently a controversy over 160 acres of this land arose in the District Court of the United States, and the Lerma title was sustained. Judge MAXEY said: "The grant being valid is within the protection of the treaty of Goudalupe Hidalgo and the Constitution of the United States, and it is not competent for the state to nullify it as a state claim without judicial inquiry or to prohibit its use as evidence."

Lerma v. *Stevenson*, 40 Fed., 356-9.

In the case of the *United States* v. *Paralto*, 19 How., 347, the court holding that:

"The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officers making it, and throws the burden of proof on the party denying it." Says,

"It is sufficient that the Archives of the Mexican government show that said power has been exercised by the government under Spain and continued to be exercised under Mexico, *and that such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities.* The plaintiff in error has not been able to produce anything from historical document or the Archives of California tending to show a want of power in the respective officers in this case. On the contrary, the presumption of law is confirmed by both."

The confirmation of Lerma's title is of all importance to us. On account of the short life of the act of 1823, these two titles were the only ones ever made in all the Republic of Mexico. The reason there were not more has been fully explained, and was not on account of the doubt of the Ayuntamiento to act in the premises. These grants were identical in form, object and spirit, and made by the same authority. The grant to Lerma was more than twice the amount of land given to Heath. The only distinction of the two grants were:

1st. Lerma was a native born Mexican; Heath was not.

2d. Lerma's grant was ordered by the departmental assembly, Heath's was not.

That Heath was, or had been prior to his application, an American citizen, was not material under the law. A foreigner was entitled to the granted bou.. y just the same as a Mexican citizen.

That the departmental assembly at that time did not have the right to grant, approve or reject titles will be clearly shown hereafter.

That if the town council had authority to grant to Lerma lands with approval of the Departmently Assembly, under the act of 1823, they had a right to make a grant to Heath without approval, therefore, if the grant to Lerma was legal and valid, so, too, was the one made to Heath. If the Ayuntamiento of El Paso in August, 1823, had the authority to grant as it did to Jesse Lerma a tract of land of 400,000 acres outside of the four leagues of El Paso "*to colonize it with families which desired to accompany him thereto,*" *then it also had authority to grant to Heath 130,000 acres to be settled with people he proposed to take with him.*

That the grant to Lerma has been determined by Mexican authorities to have been legally made is clearly proved by this record. (See pp. 249–256.)

Just as in our case the town council of El Paso, which succeeded the one in authority in 1823, tried to declare Lerma's grant invalid. In 1827, Lerma's grant was denounced by others who wanted to settle upon it. The town council then in authority decided against his title, Lerma being then in the country appealed to the governor of Chihuahua, while Heath having been driven out of Mexico by revolutionary authorities under the penalty of imprisonment and death, could not return. Lerma's case was taken to congress where it was held "wherefore this government considers that the land transferred by the granted bounty as the exclusive property of said Lerma." It cannot be said that this is only a ratification of an imperfect title by reason of Lerma being a Mexican citizen and a distinguished officer of the army, but it was a judgment of the constitutional authorities of Mexico that the town council of ElPaso had authority to make a grant identicial with that of ours. Lerma's land being denounced, the town counsel of El Paso refused to acknowledge his title, granted part of his land

to three other persons, he asked the government "*to recognize and protect his ownership of the lands, confirming him in his property which was granted him in order that a settlement be formed on said lands, and that the council of the town of El Paso be notified accordingly.*

This petition was sustained, the congress saying, "we consider *that the land transferred by the granted bounty as the exclusive property of said Lerma,*" in other words that the Ayuntamiento, under the law of 1823, had authority to make grants to colonists for the purpose of settlement. Nothing could be stronger in the right of confirmation of our title. It is not the confirmation of an imperfect or doubtful title on account of the favored circumstances of the applicant, but it is an adjudication of Mexican authority of the right of the Ayuntamiento to make a grant, not that the property might become his, but that is was already his by a valid grant, the "*land transferred by the bounty as* the exclusi roperty of said Lerma" is the language of the Mexican congress.

Our grant being similar to that of Lerma's, and having been made by the same Ayuntamiento, it is conclusive of the authority of that body to make it. Upon this point, the authorities are complete.

In the case of the *City of Brownville* v. *Basse*, 36 Tex., p.

As is said in Owen vs Presido Mining Company 61, Page 13, "Ratification eliminates from the case all question as to the Alcade power" (here town council) "to make and execute such a grant."

The confirmation of similar grants made by acts of congress or by boards of commissioners acting under their authority are also powerful evidence of the lawful exercise of the authority of these officers and being proceedings under the treaty and law, they are made a rule by which among others we may adjudicate on the claims of the present parties; in doing which we can not sustain this objection without overlooking such a concurrence of evidence of various description as leaves no reasonable cause of a doubt of the authority of Governor Folch."

Mitchell vs The United States, 9 Peteres 740

in making the ex-appropriation of the lands in controversy, for public use in 1826, were not in all respects regular and valid."

Our courts have always deferred to the political and judicial authorities of other governments in the administration and interpretation of their own laws.

Cavayos v. *Treviño*, 35 Tex., 165.

Third Propositian. Pueblo grant, or grants made by Town Council under other laws.

We submit that as the authority to Town Councils to make grants, in the law of January 4, 1813, and other laws of Mexico, was conveyed by similar if not identical language with that found in act of 1823, and the fact that such grants have always been sustained by both Mexico and the United States, is another conclusive reason for holding that our grant was made by legal authority.

The power given under this law to the Ayuntamiento to make this grant must be determined upon a proper construction of this act of January 4, 1823. The court must look to this law both for the power to make the grant and for the mode and manner of its exercise. Certain conditions and restrictions in the former laws and imposed upon the subsequent act of 1824 may serve to explain and make certain the authority of the Town Council to make this grant, but cannot enlarge or take away any right given in the law. If by any law prior to 1823 the Town Council had no power to make grants, and by this act of January 4, 1823, that power was given them, then the former law to that extent was repealed.

The history of Mexico does show that Ayuntamientos had a right under the laws to make grants of lands, which was exercised for many years, especially from 1823 to 1824. Some of these grants have been confirmed, and others are before the courts. We might cite many of these grants made during all these years from 1813 to 1824, but will content ourselves by referring to three claims. The town of Casa, Colorado, Donacious Vigil and Alexander Valle. These grants were made under the law of 1813. Many features of this law are similar to the act of January 4, 1823, passed just ten years later. In both laws the power to make the grants is given to the Ayuntamientos by the same word "designate" or "assign," but in the first law it is expressly required that the grant made must be approved by the Departmental Assembly and in the second there is no such provision. These cases are not only important to us on this proposition but they very pointedly and forcibly affirm many of the points we argued before we found them.

Decree of January 4, 1813, on reducing vacant lands to private dominion. Sureties ceded to the defenders of the country and to citizens, not proprietors.

Hall's Mexican Laws, Sec. 88, p. 45.

The first part of the law relates to lands given to soldiers. Sec. 99, Designation of Sureties, 11. The designation of these sureties shall be made by the Constitutional Ayuntamientos of the pueblos to which the lands belong as soon as the interested party shall present their documents. Next, the Expedente shall be remitted to the Provincial Deputation in order that the latter may approve it and rectify any error.

Sec. 30. Lands to be Assigned. 15, provides for giving of vacant lands to every resident who has no other lands of his own.

Sec. 105. Concessions without costs, 17. The provisions for these concessions shall be made also without costs by the Ayuntamientos, and the Provincial Deputations shall approve them.

In this act how similar is the designated power to make grants to that power in the law under which our grant was made. The fact that in our case no subsequent approval is required, does not vitiate the law or destroy the grant. The nation had a right to appoint its agent with or without subsequent approval and we must take the law just as we find it. Notwithstanding this positive law, which no one has ever questioned, and the fact that dozens of grants were being made under it at the very date of our grant, the learned council argue and seek to persuade this court that this grant was void, because the Ayuntamientos could not make grants of town lands. In both instances the lands were public lands and within the jurisdiction of the nearest organized town council to them. If the gentleman's argument is correct, then all grants made under the law of 1813 would be void.

The grant to Casa, Colorado, was made by the most illustrious corporation of Tome, July 12, 1823, for 31,779.87 acres under the law of 1813, reported No. 5 of New Mexican Land Grants, filed April 14, 1856, approved by the surveyor general, December 24, 1856, confirmed by congress October 22, 1858, Sec. 35; 35th Congress, 2d Session Report, 457, p. 18-161.

The proceedings in this grant confirm the argument we have made. The grant being intended for many and not for one alone all the grantees were named in the margin of the petition. It was subsequently approved by the Provincial Deputation because the law so required, otherwise the proceedings were similar to those in our case.

The case of *Donacious Vigil et al.* v. *Rafael Gonzales et al.*, is of such importance, we will refer to it at length. See claim No. 8, Report 457, on Claims in the Territory of New Mexico made by Mr. Sandridge May 29, 1858, page 105-154, 228-277. Recommended by Surveyor General Sept. 28, 1857, for confirmation and confirmed by the act of Congress June 20, 1860.

Land Laws of the United States, 1882, page 944.

This case affirms the following points in our case:

First. That Ayuntamientos could and did make grants in Mexico under a power similar, if not identical, with the words of the act under which we claim.

Second. Any restriction, reservation or condition not authorized by law added by a Governor to a grant made by a Town Council, is void.

Third. That the Ayuntamiento of El Paso having authority to make grants to colonists could not delegate authority to the

Governor or Assembly to approve or reject such grant, having acted by making the grant, could not delegate any authority to another to undo what it had done.

On May 26, 1814, Francisco Frujillo for himself and others named petitioned the Governor, Jose Manrique, for a grant of land for the purpose of pasturing their animals on, the same day the Governor referred the petition to the Town Council of Santa Fe directing attention to the law of 1813; also stating, as in our case, that a petition had been made by the same parties the year previous, and which had been transmitted to the chief military officer of the district, from whom no answer had been received.

July 30, 1814, the corporation of Santa Fe granted to the petitioners the vacant lands asked for. On the 22d day of June, 1815, a decree was written on the reverse of the document containing the grant made by the corporation by Alberto Maynez, Governor of the department, attempting to limit this grant that had been made in fee by the council to a right only to pasture their stock in common with others who thought proper to go there, informing them that a royal grant was only intended to cover said lands as they might plant, cultivate and fence in. December 5, 1815, the petitioners were by the Town Council put into official possession of the lands granted to them the year previous. Among the objections made by the corporation were the following: First, That the grant was made by the Town Council and was never referred to or approved by the Provincial Deputation as required by law. Second, That the grant was only to such portions of land as should be enclosed, built upon and cultivated, with right to pasture upon other portions of land within the prescribed limits. Wm. Perham, Surveyor General, quoting Article 15-17, of the law of 1813, as above, said: "The grant under consideration was made according to the provisions of law as far as the Town Council was concerned, the approval of the Provincial Deputation was a condition subsequent. The law required the Corporation or Town Council to transmit their communications to the Provincial Deputation, through the Governor, a political chief, and it has been decided by the Supreme Court of the U. S., in the case of Fremont vs. The U. S., that the omision or inability of public authorities to perform their duty cannot, upon any principal of law or equity, forfeit the property of the individual to the state. 17 Howard, p. 563. Then quoting articles 2 and 18 of the law of 1813, the General said:

"The law vested in the Town Council full authority to make these grants, and imposed no further conditions than the disposal of them after four years, and the prohibition of entail and the conveying by title of mort main. The grant made by the Town Council in this case is an absolute one, and the provisions of the law require it to go into effect immediately, so it was in our case, as the date of concession constituted legal ownership. The second article of the law required the limits of the respective tracts to be specified in order that their owners may enclose or fence them in.

This is a matter left to the option of the owner, and not a consideration imposed upon him by law. Therefore the interpretation of the law made by a subsequent governor after the grant had been made according to law by the Town Council was not binding on the parties, and was, therefore, null and void, as the law vested in him no authority to impose conditions; and any part taken by him in the premises, with the exception of being the medium between the Town Council and the grantees, was an assumption of power on his part for which he had no authority of law. The treaty of Guadalupe Hidalgo of Feb. 2nd, 1848, and the decision of the Supreme Court of the U. S., in cases occurring in Florida, Louisiana and California of a similar nature, give, in the opinion of this office, a full and perfect title to the land contained within the boundaries of the grant made by the Ayuntamiento of Santa Fe."

In the case of the claim of Alexander Valle, same report, p. 293, the Surveyor General said:

"The law of 1813, under which it is presumed the grant was made, attached no couditions thereto; and it is not shown in evidence that the Governor had any authority to attach contitions to a grant made by virtue of said law or any other in force at the time, the grant is to be considered an absolute one, and as such is confirmed."

The confirmation of these claims by Congress establishes the law of the United States upon points involved in our case, and upon which its favorable decision rests. If a grant is good as here held, without approval by the Departmental Assembly, under a law providing for such approval, our grant must be valid without approval made under a law which does not require confirmation, and that therefore any attempted submission of our grant to the Departmental Assembly was utterly void.

We cannot understand how the question argued by the gentlemen in court below have anything to do with our case as to whether the abolishment of the Chamber of the Indies by the decree of the extraordinary Cortes repealed the regulations of 1754 and the laws of the Indies respecting the public domain. We have the decision of the U. S. Land in the Hayes case that the ordinance of 1754 was repealed by the resolution ofthe Council of the Indies of December 22, 1818. Why worry over this when, as we have shown, the resolution referred only to municipal dominion, property within five leagues that belonged to towns for public use, and, again, how could it effect a right given to the councils by a subsequent law? Repealed or not repealed, did not the Imperial Mexican Congress after the independence of the nations have the right to pass a law of January 4, 1823, giving power to the Town Council to make grants of the public lands, no matter what were the regulations of 1754 or the law of the Indies? They have no more to do with the determination of this intermediate question than have the laws of the Medes and Persians.

Again, on page 19 of their argument, the learned counsel assert that the decree of the extraordinary Cortes of January

4, 1813, which we are arguing, "was annulled by the royal decree of September 5, 1814, *and did not confer by its provisions the power to grant the public domain.*" It makes no difference in our case whether the decree of January 4, 1813, was annulled or not; it could not have been or else it was restored, or the many grants under it between 1814 and 1824 would not have been made and confirmed, as is shown by the history of Spanish and Mexican grants, and the decisions of the authorities of the United States. But it is important, in ascertaining the law and facts of our case, to know that the Town Councils of Mexico did have a right to make grants under the law of 1813, and that this right was given by words similar to the language found in our law of January 4, 1823. For this reason we refer to this law and the grants made under it. If the Spanish Government gave the power to make grants to ayuntamientos, subject to the approval of Departmental Assemblies, it is not strange or impossible for the Mexican Government to give her Town Councils the same right without the requisite of subsequent approval. When the gentleman argues that the law of January 4, 1813, "did not confer the power to grant the public domain," we beg to say they differ from Mexican authority on this subject. Sec. 126, under the law of 1813. The law of the Cortes of January 4, 1813, granting to soldiers the right to claim suertes of lands in Pueblos, vested the power in the council to designate the lands to be given to them; and also to execute all the proceedings relative thereto; that is, to make the titles for said lands.

Hall's Mexican Laws, p. 54.

We can not better illustrate the truth and absolute conclusiveness of our whole argument upon the right of the ayuntamiento of El Paso del Norte to have made our grant than by inviting special attention and comparison of the law of January 4, 1823, with the law of January 4, 1813. There can be no doubt of the right of the ayuntamiento to make grants under the latter law. This conceded, as it must be, it must follow that it had the same rights under the law of 1823. The words giving this right under the law of 1823, are the same or similar to those in the law of 1813; if anything are stronger, plainer and more certain.

In article 11, of the law of 1813, we have "the designation of the suertes shall be made by the constitutional ayuntamientos." Art. 15, lands assigned to those who have no other lands, and by Art. 17, "the concessions to be made by the ayuntamientos without costs, and the provincial deputation shall affirm them," while in the law of 1823, Sec. 4, we have the words, "the ayuntamientos may designate the lands corresponding to them."

Sec. 8, of the law of 1823, speaks of the lands to be GIVEN to the colonists; in Art. 2, of the law of 1813, it is provided that "lands distributed shall be done as complete property," while in section 22, of our law, it is said, "the date of the concession of lands constitutes an inviolable law for the right of property and

legal ownership," and in section 23 it is provided "if, after two years from the date of concession, the colonist should not have cultivated his land, the ayuntamiento can grant it to another." Nowhere, in the law of 1813, is the word grant used. The power or right to grant is given by the word designate, assign or concede, or designation, assignment or concession. If the learned counsels had examined the laws of 1823 and 1813, and the decision under them, it seems to us they never would have come to the false conclusion they were driven to when they wrote, on pages 22, 23, "we cannot, by the most latitudinarian construction, hold that this section confers any authority upon the ayuntamiento to grant lands." Hence, 'colonist' must mean one of a family settled under an empresario contract, or one of a family settled upon lands designated to them by the ayuntamiento, and in neither case would the title emanate from that body. In the first place, the title would be issued by the Commissioner of the colony, with the consent of the empresario. In the last case the grant would be issued directly by the Government of the place to which the colonist had attached himself, having first admitted him and put him in possession of his lands. These two classes constituted colonists within the meaning of the law. No other colonist, if any there was, was within the contemplation of the law of 1823. The construction which we have given to this law is the same as the Supreme Court of Texas gives to the colonization law of 1825 of Coaliula and Texas, *which is similar in its provisions to the law under consideration.*" (The italics are ours.)

Harlin v. *Haynie*, 9 Tex., 459.

Here is the key to the whole of the gentleman's argument on their first point, they erroneously assume that the law of 1823 is similar to the law of Coaluila and Texas and they argue that because under this last law titles were issued by the Commissioner of the Colony or direct from the Government, and that therefore the Ayuntamiento had no authority to grant lands and "hence colonist must mean one of a family settled under an Empresario contract, or one of a family settled upon lands designated to them by the Ayuntamiento; and in neither case would the title eminate from that body." We submit that the law of Coaluila and Texas is unlike that of 1823, and say that the gentlemen cannot show a section, paragraph or line in the two laws which are alike in word or spirit. A contrast of the two laws will help to verify our argument as well as to show the false propositions of the defendants.

Extracts of the Colonization Law of the State of Coaluila and Texas, March 24, 1825.

Hall's Mexican Law, p. 131.

Sec. 413, Art. 3.—Foreigners to make a declaration of settlement and citizenship before the Ayuntamiento swearing to obey the Federal and State

constitutions and observe the prescribed religion. The learned gentlemen would hardly claim that this was "similar" to section 4 of our law of 1823.

Sec. 414, Art. 4.—May then select land which the respective political authority will grant to him *in the same manner as to a native in conformity with the existing laws of the Nation*, under the conditions that the proceedings shall be passed to the Government for its approval.

This is entirely different from anything in our law, the grant is to be made according to the provisions of another law, and then must be approved subsequently by the Government.

Sec. 428.—Immigrants to present themselves to the authorities.

Art. 15.—The families who immigrate in conformity with article 6 shall immediately present themselves to the political authority of the place which they may have chosen for their residence, who, finding in them the requisites prescribed by the laws for new settlers, shall admit them and put them in possession of the corresponding lands, and shall immediately give an account thereof to the Government *who themselves or by means of a person commissioned to that effect will issue them a title.*

Where is there any provision in our law like this? The fact that it is omitted is conclusive that our argument is correct. The Ayuntamiento having the right to designate the land to colonists, to assign and concede the same to him, it must be held, as it has been under the law of 1813, that that body had a right to execute all the proceedings relative to grants and make title of lands to colonists. And yet the learned counsel say that the provisions of these two laws are similar,

Fourth Proposition: Ponce de Leon, Secretary of the Town Council of El Paso, and Commissioner to deliver possession when our grant was made, and a witness in 1849 for Hugh Stevenson and Juan Antonia Garcia, certifies:

"that Don Juan N. Garcia, deceased, the father of the petitioner, asked for the possession of the land called El Bracito. That he also knew, not remembering the years, that an individual of the United States, named John Gill (the Spanish is Juan Gid) asked for and *received a grant* of land at the same place from the Mexican authorities, respecting those of Don Juan Garcia; this, he affirms having been one of the Commissioners in the measurement of the land asked for."

See Report 457, House of Representatives, May 29, 1858, pages 24–65–88, and page 265 of our record.

This evidence was given at request of D. Juan N. Garcia, in order that the supposed grant to Don Juan A. Garcia might be confirmed.

That William Pelham, surveyor-general, December 31, 1856, reported that the supposed grant to Garcia was lost or destroyed, and among the reasons given recommending Congress to confirm the same was the fact that the Mexican Government had made a

grant to Juan Gid "at the same place respecting those of Don Juan A. Garcia."

Here is the positive proof of the existence of our grant and, too, the evidence of its validity. True, it does not state our grant was a valid one, but if it had not been made with legal authority, it would have been no inducement for the confirmation of the Garcia grant. Having used the fact for this purpose, and the United States acting upon the same, must be held, at least, as a recognition of our rights, if not estoppel of both from now denying either the fact or validity of our grant.

They had no expediente or proof of same from the records in any of the Mexican archives. This fact was then important and necessary to secure the confirmation of their claim. If our grant was made designating the grant to Stevenson and Garcia, that was such a recognition of their grant by the Mexican government, as would authorize the American government to confirm their grant. We submit that a recognition of the Gid grant in the proceedings of confirmation of the Stevenson and Garcia claim has the same effect.

The United States after having confirmed the grant to Garcia and Stevenson because the Mexican Government had made a grant to Juan Gid, in conformity with it, cannot now say Juan Gid had no grant. The confirmation of this report is conclusive evidence that ours was a lawful, operative grant which the authorities of both nations recognized.

Clarke v. *Lockwood*, 21 Cal., 220-34.

Congress, acting in its sovereign capacity in dealing with the Mexican lands, having chosen to thus recognize the grant to Gid or Heath, it is not for the judicial department of our government to controvert what they have done.

Interstate Land Co. v. *Maxwell Land Co.*, 139 U. S., 569-579.

Tameling v. *U. S. Freehold Co.*, 93 U. S., 644.

No action of Congress relative to Mexican grants is subject to judicial review. If courts are thus bound by Congressional confirmation of a Mexican title, they are equally bound by Congress' recognition of such title. Congress acted upon the claim "as recommended for confirmation by the surveyor-general."

Tameling's case, 93 U. S., 644.

The Government, as well as individuals, is estopped by the admissions or recognitions of titles or boundaries of lands mentioned in any deed of conveyance to another from afterwards denying that such title existed.

Greenleaf on Evidence, Sec. 23.

20 Am. and Eng. Ency. L., p. 466 and note.

Grimes v. *U. S. Hoff*, R. 108-9.

2 Phillips on Evidence, 241.
Carver v. *Astor*, 4 Peters, 1–87.
Pencose v. *Griffith*, 4 Binn, 231.
1 Black, 204, 2 Black, 554.
Evans v. *The Board of Trustees*, 15 Ind., 319.
Denn v. *Colders*, 3 Johns Cas., 174.
State of Indiana v. *Milk*, 2 Biss, 197.

"In 1830, when the legislature authorized, and by its Treasurer made, to Elkins and his associates a grant of land to extend from the town of Lincoln on the west, to Hart's Location on the east, the exterior line extending along by the westerly boundary of said location, it is difficult to find any ground to imagine how, after that, the *state or any persons claiming under the state could with any show of reason, claim that there was no such thing in being as a Hart's Location.*"

Land Co. v. *Saunders*, 103 U. S., 321.

Recitals in a patent (and in our case there being no patent issued, the proceedings in Congress to obtain confirmation are the same) are always held more liberally to be evidence of what are recited, than are the recitals in an individual's deed for the reason that all lands are derived from the Commonwealth, and, therefore, the man in possession must hold from her. Thus holding he is subject to whatever recitals and admissions the state may have made before he commenced to hold. It is frequently held that a patent is not only the deed of the United States—it is evidence of the proceedings had, and is a solemn record of the government of its action and judgment with respect to the title. Both the officers of the government and the grantee, as well as those in privity with him, are bound by the recitals contained in the patent.

McGarrahan v. *New Idria M. Co.*, 49 Cal., 331.
Teschemacher v. *Thompson*, 18 Cal., 11.
Read v. *Thompson*, 5 Pa. St., 327.
Downing v. *Gallagher*, 2 S. & R., 455.
Comw. v. *Heirs of Andre*, 3 Pick., 224.

The claim that the Garcia tract was outside of our grant does not effect our rights. That direct question is not now before the court, it is only the question of the recognition of our grant and not its immediate location, as to the other parties, which is the important point in controversy. The evidence is that "Juan Gid received a grant of land at the same place from the Mexican government respecting those of Don Juan Garcia." This does not say that Garcia's land was outside of Gid's grant.

Under the circumstances and facts given, Garcia and Stevenson were obliged to make inquiries and know the whole truth as it then existed. The defendants now admit that the land they claim is within the boundaries of the grant recognized in their predecessors chain of title. It is not the question of the dispute of bound-

aries before this court but the existence, or non-existence, of the plaintiff's title that defendants seek to deny.

We submit that under the authorities they are estopped.

Haines v. *Haines*, 37 N. W. R., 563–6, Mich.
Littleton v. *Giddings*, 47 Tex., 109–118.
Magee v. *Chadron*, 30 Tex., 644–661.
Webb on Record of Title, 182.

Again this evidence of Ponce de Leon is of great importance to us in an other view. His affidavit being taken and filed in the office of the United States surveyor-general, is expressly made legal and competent evidence in our case by the fifth section of the act of 1891. Ponce de Leon was a prominent man, and, as shown by these same proceedings, was at the time, an important Mexican officer, political chief of Contonment Bravos. He was the secretary of the ayuntamiento of El Paso, and one of the commissioners who put Heath into possession. He was the leading spirit of the authority that made us our grant. He knew as much about our grant, its validity, the right of the Town Council under the law of 1823 to make it as any other man in Mexico. If this grant had been made without authority, if, in the language of the learned counsel, "the colonization law of 1823 confers no power upon the ayuntamiento to grant lands in the first instance to one individual colonist, or if the government of Mexico had denied this authority and sought to defeat Heath's grant on account of the jurisdiction of the Town Council to act in the premises, would not Ponce de Leon have known this? Would it not be impossible, save and except upon the theory of perjury, that in 1856 he would have sworn that Juan Gid *asked for and received a grant of land at the same place from the Mexican authorities?*" Here is the positive proof coming from defendants themselves; that Heath's grant was made with authority. The language of the witness not only presupposes, but proves authority. Heath received a grant of land from "*Mexican authorities*" are the words: that is, authorities authorized by Mexican law to make such a grant.

This evidence of a prominent officer and citizen of Mexico who had special knowledge of all the facts in the case, and was well informed upon the land laws of his country, should be given important weight by this honorable court.

U. S. v. *Philadelphia*, 11 How., 661.

And when taken in connection with our evidence, that the Bracito was always known and recognized in that country as belonging to Gid or Heath, the proof of our title is complete.

Fifth proposition. Resolution of departmental assembly alleging that law of 1823 was repealed, and that council acted hastily and with little wisdom in making the grant to Heath is an admission of the authority of the Ayuntamiento to make the grant.

Extract of the proceedings of the departmental assembly June 17, 1823:

"Next was read a letter from the ayuntamiento of El Paso and the accompanying report which it made to the president in regard to lands which it had given to the Anglo-American, Mr. Juan Gid, at his request, and another petition made to the same body by Senor de Albo asking for pasture land for a herd of cattle, sheep and horses, it being reduced to two sitios of a square league each. And the details of both petitions having been taken into consideration, after a full discussion it was decided that as to the grant of land made to the American, the ayuntamiento of El Paso should be reprimanded for the reason that that body had acted hastily and with little wisdom in giving away land that belonged to the people of that town, to the great injury of all its inhabitants; and, besides, the law of colonization at that time being repealed, and the said ayuntamiento to avoid making itself responsible for damages, which the stranger would claim if the families came to settle in this country, which he has offered to bring, should notify the aforesaid Gid through the medium of the representative of the United States, that the possession which was given him at the Bracito was given by reason of a doubtful interpretation and wrong understanding about the law of colonization already repealed, and that these lands belong te the jurisdiction of El Paso.

JOSE ANTONIO VISCARRA,
President."

"JUAN BAUTISTA VIGIL,
Departmental Secretary."

The departmental assembly does not deny that under the law of 1823 ayuntamiento had authority to make grants. But from what they said this power was conceded when exercised with wisdom, before the law was repealed. If the ayuntamiento had no authority in the premises then Heath, by bringing his colony to to the country, could not recover damages on account of the concessions of lands that the council "had given to the Anglo-American, Juad Gid." In that event Heath would be without remedy, but on the other hand, if the ayuntamiento had authority but only acted as the assembly claim after the law was repealed "in haste and poor judgment," then the title passed to Heath when grant was recorded and said grant could not be recalled, revoked or cancelled by any effort to give notice to Heath not to come to the country. If he did come it is admitted the ayuntamiento would be responsible for damages, or in other words that Heath's contract could be enforced. Here there was no question of damages involved—it was a question of title or no title—whether or not the grant to Heath had been made by lawful authority. We submit that this reprimand by the assembly to the ayuntamiento "*for the reason that that body had acted hastily and with little wisdom in giving away land that belonged to that town*" is an acknowledgment of the powers of the ayuntamiento to make grants. The assembly censure the council not for exercising the power to make grants, but the manner and occasion only of its making the grant. The assembly's statement that the council had given away the

lands, was an admission of its power to act if the law had not been repealed.

The reason assigned by the assembly for attempting to revoke this grant: 1st, use of poor judgment; 2d, that law was repealed; were neither valid in law, nor true in fact.

If the grant to Heath was made with poor judgment, that would not vitiate the contract. If, as they concede, the Ayuntamiento had jurisdiction, their discretion or use of poor judgment could not be inquired into. There is a distinction between setting aside a grant for want of power to make it, and trying to defeat a grant because imprudently made, and with poor judgment. The first is void for want of jurisdiction, while the second is valid *in toto* without power of correction,

Noble v. *Union River Logging R. R. Co.*, 147 U. S., 165, 176, 177,
Stimson Land Co. v. *Ranson*, 62 Fed., 426–430.

The objection is not that the officer had no jurisdiction or authority to act, but that he had no authority to act in the manner he did act. How or why the officer acted is not a matter to be inquired into by this court. The officer to increase the quantity of land was the judge of the qualifications of the applicant, and his decision was final unless fraud be shown on the part of the grantee.

Jenkins v. *Chambers*, 9 Tex., 167–230.
Ward v. *McKinney*, 25 Tex., 258–265–6.
U. S. v. *Arredondo*, 6 Pet., 729.

As we have said, the departmental assembly raises no question of jurisdiction; does not intimate that the ayuntamiento acted *coran non judice* except as it alleges the law was repealed. We have shown that the ayuntamiento had authority and that its action was *coran judice* , and this the assembly admits.

We submit that this action of the assembly in trying to defeat our grant under the pretext that the law had been repealed, was an exclusion of all other reasons for its defeat, and a full admission of the authority of the ayuntamiento in the premises. This is a clear case of the applicability of the maximum "*designation unius est exclusio alterius et expresion facit cessare tasitium.*" Designation of one is the exclusion of another, and that expressed makes that which is implied to cease, 2 Bouviers L. D., p. 123, Coke Litt. 210. We also affirm that this recognition by the legislature of Mexico of the fact and right of the ayuntamiento to have made the grant was and is pursuasive, if not conclusive, evidence of the intent and meaning of the law of January 4, 1823. If there was no such authority by said law vested in the ayuntamiento to make the grant, the legislative body of the state should and would have said so. It would have denied jurisdiction in the first place, and not have based its action on the repeal of the law, which had

not taken effect when our grant was made, and the exercise of little wisdom by the council in making our grant.

Bromville v *Cavayos*, 100 U. S., 138–142.

"A"—*Governors or departmental assemblys of territories under the act of January 4, 1823, and the laws of Mexico, as then existing, had no authority to approve or reject grants.*

It having been necessary to so carefully provide by express provisions in the law of 1824, that the grants made by the government should not be valid without ratification or approval, the fact that no such conditions are found in the law of 1823, it must follow that under this law the Ayuntamiento had the power to grant and confirm titles without subsequent approval, and that a provision of this kind embodied in a title executed and delivered to a grantee would be useless and unnecessary, and therefore void, and should be treated as surplusage. There is no provision in this act that grants should be sent to the governor and departmental assembly. They had nothing to do with the negation or approval of titles. The executive referred to in the act of January 4, 1823, is the chief executive and not the governor of the state or territory. The governors could not point out the particular provinces where lands were to be settled, this could only be done by the chief executive as provided in the act. They at that time had no jurisdiction outside of their own territories and none whatever over the public lands. That the right of eminent domain over the public lands was vested originally in the federal government of Mexico is not questioned. This subject is fully discussed in the case of *The Republic* v. *Thorn*, 3 Tex., 499–504.

"The confederacy of the Mexican states was not formed, originally, by a constitutional compact between several separate states, nor by a grant of powers originally vested in the several provinces which afterwards constituted the states of the union.

"The public lands of the U. S. of the north, before the acquisition of Louisiana and Florida, belonged originally to several states, and became federal property by purchase or voluntary cession from the states.

"But in the Mexican union the general government claimed, originally, the property in the public domain. It is true that, under former governments, the provincial authority had exercised certain powers of control over the public lands, but this was in subordination to the central or supreme authority of the country, whether vested in the crown or represented by the vice-royalty of New Spain, or the sovereign provisions governing juntas, in the emperor Iturbide, or the other authorities which succeeded, before the assemblage of the constituent congress which finally adopted the federal system, and out of the municipal subdivisions of the territory formed the states of the confederation."

Prior to the national colonization laws of the 18th of August, 1824, the states did not claim any right of control over the public lands.

The law of 1823 was national in all of its provisions, the government selected as its agent for the distribution of public lands the Ayuntamientos in their respective jurisdictions. But in 1824 a new system was provided by which all the vacant lands were declared subject to colonization, and that states were authorized to form colonization laws or regulations for their respective states in conformity with the constitutional act, the general constitution, and the regulations of the national colonization law. The power of disposing of the public lands was relinquished and ceded to the states, the general government, for colonization purposes, retaining control only over such lands as lay within the territory of the republic, and certainly not under the law of 1823.

The Republic v. *Thorn*, 3 Tex., 505.

The proposition has been frequently sustained by this Court:

"The grant is not set forth in the record, but we must presume that it was in the ordinary form of grants made by former governors of California under the Mexican colonization laws of 1824, *as under no other law were these governors empowered to make grants of the public domain.*"

Van Reynegan v. *Bolton*, 95 U. S., 33, 34.

U. S. v. *Vigil*, 13 Wall., 449–456.

Maxwell Land Grant Co., 121 U. S., 325.

"That the decree of the Spanish Cortes of 1813, *as well as all other laws of Spain in relation to the disposition of the Crown lands were inapplicable to the state of things which existed in Mexico after the revolution of 1820, and could not have continued in force there, unless expressly recognized by the Mexican Congress.* That the Spanish system of disposing of the public lands was so different from that provided for by the Mexican law of 1824 and the regulations of 1828, that they were repugnant and inconsistent, and that the former was repealed by the latter."

All decrees and regulations prior to 1820 are held inoperative upon Mexican grants.

U. S. v. *Vallego*, 1 Black, 541.

U. S. v. *Workman*, 1 Wall., 745–761–2.

U. S. v. *Vigil*, 13 Wall., 450. Affirmed by U. S. Land Court in *Hayes* v. *U. S.* Opinion by Justice Murray.

"B." It cannot be held as argued by the learned counsel that "the concession to Heath was annulled by the Mexican government," as no authority having any power in the premises even attempted to destroy our title. This land was in the National domain. Neither the States or Territories had any jurisdiction of the public lands in Mexico until after the law of 1824.

Leese v. *Clark*, 3 Cal., 23, and authorities above.

The Departmental Assembly having no jurisdiction over the subject-matter, their action or attempted revocation was of no effect. He who alleges that our grant was annulled must show an affirmative action by legal and competent authority. Here there was no actual annullment of our grant by any authority having jurisdiction. A grant is valid even if the power to disarm it existed, until actually disavowed by superior legal authority.

U. S. v. *Arredondo*, 6 Peters, 723–4.
U. S. v. *Clarke*, 8 Peters, 451.
And authorities above.
Sabariego v. *Maverick*, 124 U. S., 261, 280–293.
Jones v *Garcia*, 11 Tex., 186, 200, 210.

Three radical changes in the system of granting lands in Mexico were made in the period of two years; the first, February 24, 1821, when the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; then later when Iturbide was proclaimed emperor and and the law of January 4, 1823, was passed. Soon after Iturbide was dethroned and shot and the colonization law of August 4, 1824, passed by the same Cortes that had ordered the coronation of Iturbide. Most of Mexican grants were made under this last law, but the validity of our grant must be ascertained and determined by the act of 1823. It is important for this court to keep in mind these changes and how they were brought about, in order that we may the better ascertain what the power delegated under this law was, and wherein it differed from prior and subsequent laws.

Judge MURRAY, speaking of the mutations of these Mexican laws, said, in the case of *Leese* v. *Clark*, 3 *Cali.*, 23:

"Prior to the Mexican revolutions which produced the Plan of Igula, February 24, 1821, the unappropriated lands in this country constituted a part of the domain of the Spanish monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the king, and exercised the sovereignty in his name.

But on the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico except by an act of Mexican soverignty. The royal decrees, regulations and usages ceased to have any effect whatever as to subsequent grants of lands."

This point was determined by the Mexican congress, in a case which arose shortly after the independence of the government, and has ever since been acquiesced in. On the 17th of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas.

On the 19th of August, the Mexican governor of that province (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the young Austin.

Had the royal laws and usages still continued to retain their force the acts of Martinez would have been valid, but the Mexican government at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty, refused to confirm the act of its own governor, done after the change on the ground that the sovereignty could be exercised only by the Mexican nation. It was then discovered that a new law was necessary. The subject attracted public attention, and on the 4th of January, 1823, a general law on the subject was promulgated, giving right to ayuntamientos to make grants in certain cases, but Iturbide being shortly aferwards deposed, congress on the 11th of April, 1823, suspended that law, and on the 18th of August, 1824, as it was then organized, enacted a general colonization law, prescribing the mode of granting public lands throughout the Mexican territory.

White's Recop., 561, 8, 71, 76 and 82.

Therefore, the governors having no jurisdiction to grant, confirm, approve or reject titles to public lands under this act, the fact of sending our grant to the territorial government and the subsequent action of the departmental assembly was a nulity, being unwarranted and contrary to law. Our title evidenced by a proper conveyance could not be defeated by a condition not authorized by law. This point has been directly settled by the Supreme Court of Texas.

Swift v. *Herrera*, 9 Tex., 263–282.

The commissioners authorized to grant lands put a petitioner into possession, deciding that under the 12th article of the law of 1825, he was exempted from making any payment to the state. The governor to whom the papers were afterward sent, according to law, for approval, confirmed the title subject to the payment of certain dues to be made to the state. The grantee did not pay said dues. Held:

"The governor had no authority under the act to impose as a condition of the grant the payment of dues. The assumption of power in imposing such a condition is unwarrantable, and therefore void. The grant itself was issued by competent authority, in the legitimate exercise of power, and is not vitiated by a condition which in contemplation of law is a nullity."

Affirmed in *Fulton* v. *Bayner*, 18 Tex., 50.
Mott v. *Reyes*, 45 Cal., 382–9.

Unwarranted, illegal, or void conditions are nullities.

Barkdale v. *Elan*, 30 Miss., 964.
Weatherby v. *Weatherby*, 13 S. & M., 685.
Rogers v. *Sebastian Co.*, 21 Ark., 440.
Adair v. *Co. of Logan*, 11 Sec., 339.

Therefore " the proceedings of the Departmental Assembly left the title as it was before its action.

Mott v. *Reyes*, 45 Cal., 389.

" *C.*" *Our grant was not upon a condition precedent of approval Under the law of 1823 all such conditions were illegal and void. What was done or said by letter or otherwise after the papers were delivered to the grantee or recorded by the ayuntamiento, could not in any way effect our title. If the ayuntamiento had a right to make a grant to a colonist with the approval of the Departmental Assembly, as it is shown it had by the grant to Lerma, see p. 56 of our argument, then it must follow that body had the authority to make the grant to Heath, without such approval.*

Nothing sufficient to make a condition can be found in the title delivered to Heath. According to the translations filed it is said " with the supreme will of the governor, to whom report will be made, his petition is admitted and his proposition accepted." We are informed that the original is " that saving the decisions of the general government, etc." These words according to either interpretation, must be construed strictly, as a condition precedent can be created only by clear and positive words, did not prevent the vesture of title in Heath. The grant was made without any attempt to limit the granting clause with any conditions whatever. We must take the deed as it is.

Conditions are not favored either in law or equity and it is held " whatever words are relied on as creating a condition, must not only be such as of themselves would create a condition, *but must be so connected with the grant as to qualify or restrain it.*"

Leading C. in Am. L. of R. P., Vol. 1,p. 124–136–143.
Laberee v. *Carlton*, 53 Me., 211.
Wheeler v. *Walker*, 2 Conn., 196.
Cluten v. *Washburn*, 46 N. W. R., 555–6.
Curtis v. *Board of Ed.*, 23 Pacf., 98.

Again, as shown by our argument, page , the governor having no authority to make or affirm grants, this provision was void and therefore of no effect, and the Town counsel could not delegate its authority to grant to any one, or make its grants contingent on the will of a stranger to the act of 1823.

History, of which the court must take knowledge, shows that a revolution was taking place, and at or about the time our grant was made, Iturbide, the emperor, was dethroned, and the laws passed under his reign repealed and abolished. Here was a complete and successful revolution, destroying and overthrowing the powers that had made us our grant. Surely this had the same effect as the change of property from Mexico to the United States, and it is clearly settled that a change of one government to another by revolution or treaty excuses all conditions subsequent;

nothing done or omitted to be done afterwards will work a forfeiture.

Hornsby v. *U. S.*, 10 Wall., 224–239.
Sutter v. *U. S.*, 21 Howard, 170–8.

Non-fulfillment of conditions hindered or prevented by a revolution will not work a forfeiture of title.

U. S. v. *Vaca*, 18 How., 556.

Where the performance of a condition subsequent was rendered impossible or unreasonably burdensome by cession of the territory to another government a court of equity will relieve from the condition.

U. S. v. *Arredondo*, 6 Pet., 691.

This revolution prevented the approval of Heath's title by the emperor who made it, he being dethroned. If his title as we claim needed no approval then it remained good and perfect, but on the other hand if approval was necessary (which we deny) then undoubtedly the revolution and repeal of the law of 1823 disabled Heath from obtaining a definite title, but he was not divested of the right of property he had acquired by the original grant. In either event the grant was relieved of the conditions subsequent and became absolute.

Fremont v. *U. S.*, 17 How., 541, 561–2.
U. S. v. *Reading*, 18 How., 1.

The point that we argue, namely, that our grant was not upon a condition precedent, has been directly settled by high authority. The grant to Hornsby had in it the express words:

"*Subject to the approval of the departmental assembly*," yet it was held "there is nothing in the objection which touches the validity of the instrument at the time it issued, *and the clause subjecting the grant to the approval of the departmental assembly did not prevent the title from passing to the grantee upon the execution of the instrument.*"

Hornsby v. *U. S.*, 77 U. S., 224–238.

The grant to Sutter contained similar words. Held:

"Nor did the clause subjecting the grant to the approval of the supreme government and departmental assembly prevent the title from passing." That approval was not a condition precedent to the vesting of the title. The view we have expressed of the condition annexed to the grant of Sutter and the provisions subjecting it to the approval of the supreme government and departmental assembly, are in accordance with the decisions of the Supreme Court of the United States in the *Fremont and Reading* cases. In both of these cases the grants were subject to conditions and to the approval of the departmental assembly, and neither received such approval. And the court held the conditions subsequent, if the approval of the departmental assembly and the supreme government were a condition precedent, then no title whatever passed by the grant of the governor. The grant would in that case be

only the first movement towards a title, and be no more operative as a conveyance than a bill passed only by one house of the legislature would be operative as a law. The consequence of such a position would be startling, and it would be impossible to estimate the confusion and injury the consequences of such a position would lead to, carried to its necessary and legal results. But such approval, as we have already shown, was not a condition precedent. The title passed to Sutter by his grant; an estate vested in him, subject, it is true, to be defeated by the action of the Mexican government by direct rejection (speaking of the law of 1824) or in case of non-compliance with its conditions, by precedings to that end."

Ferris v. *Coover*, 10 Cal., 589–617–8–9.

The Sutter title was several times sustained by the Supreme Court of the United States. In *U. S.* v. *Reading 18 How.*, 4, the proposition that the grant was provisional only, having been made subject to the approval of the departmental assembly, and as that had not been given, that it passed no such interest in the land to Reading as entitled him to a confirmation of the grant, was denied. From these and other authorities it must follow that what was said by the town council in letter to governor attempting to engraft on our title a condition precedent of approval as well as what the departmental assembly did subsequently, can not in any way affect the title that had been vested in Heath. This letter is no part of our grant. It is a separate and distinct paper. Is not part of our expediente, or of the record at El Paso, or of the testimony given to Heath. The grant was complete when recorded, and the following certificate of the secretary was added before the letter was written:

"Copy from the original in the record book of the acts of this honorable corporation, kept in my office, to which I certify.

JUAN MARIA PONCE DE LEON, *Secretary.*

The enrollment was made prior to this certificate being written, and copy given to Heath. Then a copy of the record thus made afterwards sent to Santa Fe. What was there said, written or done was a nullity, being illegal according to the authorities.

There are three methods only of annexing a condition to a grant:

1. May be inserted in the same deed.
2. It may be endorsed on same deed before delivery.
3. It may be contained in another deed delivered at same time.

1 Robb Abst., 413–414.
2 Sand, 48.

2d "*a.*" Deed once enrolled cannot be recalled or annulled.

Titles to land may be acquired by private deeds; second, by public grants, patents, acts of the legislature, or by a treaty. These second grants are matters of record. All grants of record

are complete, final, absolute, when recorded. Neither the land officers nor the executive can recall or correct a title for land when once enrolled. This being the final act which closes the transaction, their power is gone. If fraud, mistake, error or wrong has been done, that must be inquired into by a bill in equity or by some other judicial proceedings. This is true of the grants of all nations, especially of those made by Mexican, Spanish or French governments. These instruments of title were always recorded in some public office whose officers were authorized to make grants, and once enrolled, the authority of said officers over the land and over the title to the land conveyed ceased. They could not recall, cancel or annul any grant once made and enrolled.

U. S. v. *Schurz*, 102 U. S., 378–402.
Moore v. *Robbins*, 96 U. S., 530–1–2–3.
Noble v. *Union River Logging Co.*, 147 U. S., 165.
Stimson Land Co. v. *Ransom*, 62 Fed., 426–429.
6 Rights, Remedies and Practices, Art. 2696.
U. S. v. *Stone*, 2 Wall, 525, 335.

Congress has no power to nullify titles confirmed by the authorized agents of the government.

Reichert v. *Felps*, 73 U. S., 6 Wall, 160.

As there was a vain effort of the revolutionary government that succeeded Iturbide to defeat our title by trying to undo what had been done in the matter of our grant, the proposition, we argue, becomes a very important point in our case. We will therefore sustain it by a full quotation from high authority.

That a deed from a private individual must be delivered before the title passes is an elementary principle of law, but this is not so with a deed from the government or a public officer, it takes effect when recorded, it is then the power of the government over the land conveyed ceases.

In the case of *Bicknell* v. *Comstock*, 113 U. S., 149–151, a patent was issued to Bicknell, and recorded in the land office at Washington, D. C., and sent to Fort Dodge, Iowa, May 1, 1859. In June, 1870, the commissioner of the general land office ordered return of this patent to his office; on its receipt he tore it up and mutilated the record thereof in the general land office; held that this action was utterly unlawful, and left the patent of 1869 to Bicknell in as full force as if no attempt to destroy or nullify it had been made, is a necessary inference from the principle established by the court in the case of *U. S.* v. *Schurz*, 102 U. S., 378. That principle is that when the patent has been executed by the president, and recorded in the general land office, all power of the executive department over it has ceased. In the case of *U. S.* v. *Schurz*, 108 U. S., 378, the distinction between the transfer of title by private deed and by matter of record is pointed out, and the interesting and forcible opinion of Judge Miller, sustained by

authorities from Blackstone down to that date, holds the propositions; that patents are perfect grants without the prerequisite of their delivery; that when once recorded can only be revoked or annulled by *scire facias or other judicial proceedings;* that title to land passes at date of patent though the patent still remains in the land office, without any actual transmission of it to the grantee. That the title, in the case of state or national grants, passes when the last act in the services essential to the transfer is performed, and that is when recorded. Then the land has ceased to be the land of the government, and the powers of the officers to deal with it have passed away.

In the case of *Donner* v. *Palmer*, 31 Cal., 500, which was affirmed in *The U. S.* v. *Schurz*, 102 U. S., *sup.*, and in *Jick* v. *Diaz*, 37 Cal., 442, it is said that the same rule as applied to grants to patent was also held to apply to grants made under the Mexican government, that when once entered in the books kept by the alcade or other public officer making grants the power of the government over the land conveyed ceased.

Donner v. *Smith*, 24 Cal., 114.

"Neither the land office nor the executive can recall or cancel a patent for land which has been duly issued. If a patent ought to be rescinded on the ground of fraud, or for some other such good reason, the remedy is by bill of equity in the name of the United States. In cases in which the officers of the land department have acted within the scope of their authority, all right to control the title or decide on the right to the title has passed from the land office."

Moore v. *Robbins*, 96 U. S., 530.

Johnson v. *Towsley*, 13 Wall., 85.

"The government cannot attain the same end indirectly by a recital in a second patent that there was a mistake in the issuance of a prior patent, the first is conclusive until properly set aside."

Jackson v. *Lowton*, 10 John., 23, 6 Am. Dic., 311.

"If in proceedings of a grant to two, one of the grantees, before the grant is complete, should appear before the alcade and consent to renounce his interest, decline the same and request it to be made to the other grantee alone, and this is done, it may be shown by parol testimony, provided the alcade has made indorsements thereon. But, if the alcade has made the grant to two persons jointly and has delivered possession and completed the proceedings, the title vests in the two jointly, and an indorsement then made by the alcade on the grant, that one of them has renounced, and that the grant shall inure to the benefit of the other, does not divest the title of the one said to have renounced."

Lick v. *Diaz*, 37 Cal., 437–447, 30 Cal., 65.
Affirmed in 46 Cal., 479.
Becknell v. *Comstock*, 113 U. S., 149.

3d "A."—Our grant was not annulled by legal authority, or otherwise.

The departmental assembly did not attempt to annul the title by any judgment or decree. Having learned, June 17, 1823, that the law was repealed, for this reason they said the land still belonged to the jurisdiction of El Paso. Neither did the general government revoke our grant; no record can be found to this effect. Therefore, there being no decision of any authority having jurisdiction in the premises annulling what had been done, our title remained just what it was in the beginning — a valid right evidenced by judicial possession and proper *espedentia*. If our grant was to be approved by the general government (and this we deny), it was the duty of the grantor and not the grantee to see that the papers were sent there. No neglect or failure in this respect can be visited upon us. He who alleges that our title is not good must show want of authority in the grantor, or that the grant we received was subsequently annulled by competent authority.

U. S. v. *Arredondo*, 6 Peters, 723–4.
Mott v. *Reyes*, 45 Cal., 579.

"*A grant under general power should be considered as valid, even if the power to disavow it existed, until actually disavowed. It cannot be doubted, a grant not actually annulled by superior authority should be received as evidence of title.*"

U. S. v. Clarke, 8 Peters, 451.

"The divesture of the title by the government can only be accomplished in the mode authorized by law."

Doswell v. *De Le Sanger*, 20 How., 29–34.
Johnson v. *Tousley*, 13 Wall., 76–85.
Jones v. *Montes*, 15 Tex., 351–354.

"It is held that a legislative grant, competently made, vests an indefeasible and irrevocable title. There is no authority or principle which could support the doctrine that a legislative grant was revocable in its nature and held only *devente bene*. Nor can the legislature repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws and by such repeal vest the property in others without the consent or default of the owners."

Terrett v. *Taylor*, 9 Cranch, 43.
1 Vol. Kent Com., 416.

"If land is granted by a statute, its legislative power is incompetent to annul the grant and grant the land to another."

U. S. v. *Arredendo*, 6 Peters, 737.

Our case in principal comes within the ruling of the court in *U. S.* v. *Reading*, 18 How., 7. Speaking of approval of Departmental Assembly, the court said:

"A right and title passed by the governor's grant, but its definitive validity was suspended for the approval of the assembly: and so it continued to be suspended, until its approbation had been given when the title became definitive. But, if that was refused, it did not take away, nor in any way qualify, the grantee's title, but only kept its final validity in suspense until the grant had been rejected by the supreme government of the republic; it being the duty of the governor, after its rejection by the assembly, to forward the documents of title to the supreme government for its decision. Where the archives of the territory of the Californias do not show that the governor's grants of land had been sent to the departmental assembly, or that, having been sent, they had been rejected, and that after such rejection they had not been sent, by the governor making the grants to the supreme executive government for its final decision—the titles of the grantees are just what they were in their beginnings, and are sufficient, now that the territory has been transferred to the United States, for confirmation under its statute of the 3rd of March, 1851."

Much more is this rule true when, as in our case, the law of 1823 not requiring approval, our title being definite and valid in the first place, did not remain suspended, and not being reversed or rejected by authoritive official act of the Mexican government is a complete and perfect grant to-day.

Such a grant is equivalent to a patent in the U. S. and a "patent" says the court in *United States* v. *Stone*, 2 Wall., 525, "is the highest evidence of title and is conclusive as against the government and all claiming under junior patents or titles, *until it is set aside or annulled by some judicial tribunal.*"

Moore v. *Robbins*, 96 U. S., 533.

The ayuntamiento was the agent or trustee of the general government to issue grants under this law, and as such could not delegate the right to make grants or the power to revoke or annul them.

A delegated authority cannot be delegated.

Shankland v. *City of Washington*, 5 Peters, 390.

Pearson v. *Jamison*, 1 McLean, 197.

Pendall v. *Rench*, 4 McLean, 259.

The powers and duties of a trustee cannot be delegated unless there are express directions to that effect in the trust.

4 Rights R. & P., p. 3,455, Sec. 2,027.

City of St. Louis v. *Priest*, 88 Mo., 612–614.

"In all cases of delegated authority, when personal trust or confidence is reposed in the agent, and especially when the exercise and application of the power is made subject to his *judgment or discretion*, the authority is purely personal, and cannot be delegated to another unless there is special power of substitution. Such is the rule in relation to powers created by deed or will, and *a fortiori* is it so where the authority is conferred by act of the legislature."

Lyons v. *Jerome*, 26 Wend, 485.

The ayuntamiento was to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public individuals, and could not delegate to the assembly the right to decide these questions, even though under the law the assembly had the authority to approve the grant, which we deny.

U. S. v. *Vigil*, 13 Wall, 449–451.

4 "*a*." Our grant was a perfect vesture of title which could not be annulled

In making this deed the Ayuntamiento acted judicially. It was its duty to determine if Heath was a fit person to receive the bounty, whether the facts existed that would warrant granta and whether all antecedent acts has been performed. It could not evade or shift this duty. Any attempt to leave the matter to the will of the Governor was unwarranted and therefore void. That it did decide all these questions is evidenced by the deed and possession given by Heath. Therefore the deed must stand the attempted condition being illegal and void must be taken as surplusage.

Ming vs Foote, 33 Pacif. 521.
Green vs Baker, 66 N. W. 1035.

The phase that "with the will of the Governor" no more defeated this grant than the entry by the judge in a judgment against the defendant and in favor of the plaintiff for $1,000 "upon approval of the governor of the state" would defeat said judgment.

Quoted and affirmed at length in case of *Gonzales* v. *Ross*, 120 U. S., 626.

As a justification for what the departmental assembly did, it will not do to say, that all the ayuntamiento could do under the law of 1823 was to have issued a concession, and that all Heath got was a permission or license to occupy this land when his colony came, and that, therefore, the government had right to annul this inceptive title. That the grant made in fact was *in presenti* and a fee simple title we will show hereafter. And we submit that colonization titles under the Mexican laws, especially that of 1823, were perfect titles in the first instance, but charged with conditions as to occupation and settlement. The judicial delivery or possession by the officer or agent appointed for that purpose always passed the livery of seizen by adding the *jus in re* to the *jus ad rem*, forever designating and severing from the public domain the tract granted

by measuring its extent and establishing its boundaries. Titles issued to colonists under the colonization laws of Mexico were of an entirely different character from the concession issued by Spain, of which we have knowledge under the Louisiana purchase. Under the Mexican law the extension of grants by a commissioner or town council completed the title without any other act of the government, notwithstanding the impositions or conditions subsequent. Under these laws the title of possession was a final title, vesting the fee absolutely in the grantee. Conditions were annexed, but they were conditiens subsequent, upon the non-performance of which the titles were subject to forfeiture, and might under the 23d section of the act of 1823 be regranted to another, but until which the fee or proprietorship was in the grantee.

Ganzales v. *Ross*, 120 U. S., 626.

Hancock v. *McKinney*, 7 Tex., 384.

U. S. v. *Castillero*, 2 Black, 231–350.

Fremont v. *U. S.*, 17 How., 557.

Ferris v. *Coover*, 10 Cal., 589.

In the case of *White* v. *Holiday*, 17 Texas, 613, speaking of grants to colonists, the court said:

"The title introduced in evidence was a final title, vesting the fee, with the possession, in the grantee. It is less formal in its statements and recitals than the colonists' titles usually are; but it is not, on that account, the less effectual to pass to the grantees the ultimate proprietorship of the soil. It adjudges to the grantees the title and possession of the land, which had been surveyed to them by a surveyor appointed for that purpose; the commissioner recites that he put the grantee in possession, 'performing all the acts of true possession, and he formally executed to them title.' There remained, *no act to be done on the part of the government to complete the title, no further act of confirmation or investure of title was contemplated or required by the laws; and nothing further was required to vest in the grantee a perfect title.*"

The proposition which we present must follow. There is nothing in the law of 1823 that warrants the conclusions that the departmental assembly could act as a court of appeals or error. In this case no appeal was given by the act of 1823. And it is held:

"If no appeal is given from a final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only for fraud in the party who obtained it."

Gregnon's Lessee v. *Astor*, 3 How., 339.

U. S. v. *Arredondo*, 6 Peters, 728–9.

In the case of *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S., page 654, it is said:

"The Supreme Court did, indeed, say in relation to this matter that the

commissioner had no authority to vacate the entry, and that any order that he might have made did not affect the rights of Egan, and cited to the proposition the case of *Brill* v. *Stiles*, 35 Ill., 305, where it was held that the mere fact that entry has been declared void by the Commissioner of the General Land Office does not have the effect of vacating the entry."

In other words, the court was of the opinion that the commissioner could not, without notice and arbitrarily, deprive a person of land lawfully entered and paid for, as was ruled in *Cornelius* v. *Kessell*, 128 U. S., 456–461. In this last case, on page 461, it is said, in addition:

"But the power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony; or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a lawful interest in the property, add the right to the patent; therefore, he can no more be deprived of it by order of commissioner than he can be deprived by such order of any other lawfully acquired property. Any deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

In *U. S.* v. *Virgil*, 13 Wall., 451–2, in substance it is said:

"*The ayuntamiento was to decide under the provisions of this law whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. The Mexican government having chosen to intrust to it the execution of its policy on the subject of public domain, it was not for the assembly to interfere with the execution of that trust, when the law gave them no authority to meddle in the matter. Whether this was wise or not, be this as it may, it was the undoubted right of the Mexican government to decide the question for itself, and this court cannot be required to go further than to give effect to that decision.*"

But the departmental assembly merely tried to undo without authority that which another body acting with authority in the premises had done.

The law warranted the action of the ayuntamiento, but neither the letter nor spirit of the law sanctioned the right of the assembly to reverse its actions. Here is a conflict of authority. Which must stand? We submit that if the ayuntamiento had authority in the premises as shown by the statute and decisions, and virtually conceded by the assembly, which tried to reverse what had been done in error of judgment, then our grant is to-day valid and should be confirmed. This must be true if the ayuntamiento had jurisdiction to make our grant as they did. It is an axiomatic proposition that when jurisdiction has attached, whatever error may subsequently occur in its exercise, the proceedings being *coran judice*, can be impeached collaterally only for fraud. In all

other respects it is as conclusive as if it were irreversible in a proceeding in error.

McNitt v. *Turner*, 16 Wall., 352.

If the assembly acted without jurisdiction, then its action is void. This question must be determined alone by the act of January 4, 1823. There is not a word, syllable or sentence IN THIS act to authorize the submission of our grant to the departmental assembly. This must be the test of their action. The power to hear and determine a case is jurisdiction. If the law confers the power to render a judgment or a decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case is judicial action by hearing and determining it.

Gregnon's Lessee v. *Astor*, 2 How., 318–337.
Vorhees v. *Jackson*, 10 Peters, 449.
Florentine v. *Baston*, 2 Wall., 210–216.

Both the ayuntamiento and the assembly claimed a right to do what was done. The authority of the first was clearly recognized by statute, that of the second was not. The question here then is the distinction between matters of error and matters of jurisdiction in the granting of title to real estate. This distinction is clearly recognized by the authorities last above quoted and others.

Mohr v. *Manierre*, 101 U. S., 417–421.
Holmes v. *Oregon & Cal. R. R. Co.*, 9 Fed., 232–3.
Leese v. *Clark*, 18 Cal., 535–273.

If the council made mistakes in the exercise of bad judgment, as the assembly claimed, that was a matter that could not be inquired into after our title was once recorded. The record shows that objections were made during the progress of the proceeding, that they did not go in haste, but made faithful investigations, finding and reporting that there were no reasons why they should undo what they have already done in the matter of the grant to Heath.

That the ayuntamiento had authority and jurisdiction in the premises under the law of 1823 we have shown, therefore the words of the courts in the cases of *Hancock* v. *McKinney* and *U. S.* v. *Arredondo*, are very applicable and important in this case.

"Here there is no question as to the authority of the officer to make a grant. The question is whether he erred in a manner of exercising his authority. We are not prepared to say he did, but if he did, it was a mere error in judgment and the act done was not against law, being within power and authority conferred, it would in general principles be valid and binding until reversed by some competent revising tribunal."

Hancock v. *McKinney*, 7 Tex., 441.

"It is an universal principle that when power or jurisdiction is delegated

to any public officer or tribunal over a subject matter, and its exercise is confided in his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred."

U. S. v. *Arredondo*, 6. Pet., 729.
Jenkins v. *Chambers*, 9 Texas, 230.

"Even if the law is susceptible to two constructions, and the officer whose function it was to act under the law having decided, his decision could not now be disregarded."

Ruis v. *Chambers*, 15 Texas, 587-590.

5 *a*. *Law of 1823 not repealed when our grant was made.*

What the departmental assembly said of our grant, as to the law being repealed, etc., did not affect our rights, neither does it afford any light by which the court should determine our claim as against the positive laws of that nation.

"The rights asserted by the inhabitants of the territory to their property depend upon the concessions made by the officer of the former government having at the time the requisite authority to alienate the public domain and not *upon any subsequent declaration of Mexican commissoners.* Rights of property depend on a *legal and judicial* construction of the statutes existing when they vest not on a legislative construction by a subsequent declarative act.

Hunt v. *Hunt*, 37 Maine, 333.
U. S. v. *Yorba*, 1 Wall, 422-3.

As a matter of fact the law, this act of Jan. 4th, 1823, was not repealed when our grant was made. April 3d, 1823, the second petition of Heath was filed and accepted by the ayuntamiento. The final act ended April 25, 1823, and the title on that day became vested *eo instanti* in Dr. Heath. April 8, 1823, the sovereign congress repealed or suspended the colonization law of 1823.

Early Law of Texas, p. 46-34, Act of decree relating to Austin's colony.

But this repeal or suspension had not taken effect when our grant was made, as no publication of said act had been or would have been made at El Paso at that time. Laws of Mexico did not take effect in any part of the country until they had been promulgated or published there.

L. I. Tit., 2 book, 3 Recop. Novissima.
Houston v. *Robertson*, 2 Tex., 1-28.
Conzales v. *Ross*, 120, U. S., 605-616-6.

Laws of Mexico of no validity until published.

"Section 7. Promulgation of the law. But the sanction of the law is not the promulgation, as some have believed. The sanction necessarily pre-

cedes the promulgation, the former is the royal approval of the law and the other is the mode of making the law known to the people, and to make it mandatory for them, because no one can act according to a rule which is not known. *The legislative act, although invested with all the force of which it is capable by the sanction, is not, nevertheless, effective law until it is promulgated.*

VIII. Promulgation, then, must precede in order that laws be binding and may be executed (*law* 12, *title* 2, *book* 3, *Novissma Recopilacion*). Promulgation is the act by which laws are published to the world, it is the living voice of the legislator, and it is within the province of the executive which provides that it shall be made throughout the land by edicts or by proclamations according to the customs of the place.

Escriche, under head of Ley.

A law is binding so soon as it is promulgated, unless the time at which it shall begin to be binding is expressed in the law, as it sometimes occurs; but until it is promulgated it has no binding force, because it does not exist for the people except by publication."

Escriche, under head of Promulgacion.

El Paso was situated more than fifteen hundred miles from the capital of Mexico, where the repealing act was passed; with no railroads or telegraphs, and bad roads, and all means of communication difficult and dilatory, it was utterly impossible for said law to have been published at El Paso when our grant was made. The supposition is that the law was published in a reasonable time, and under the circumstances of the case, reasonable time was nothing short of several months. The record shows that the act of January 4, 1823, did not reach El Paso for publication until March 2, 1823. The presumption is that the repealing law was not published any sooner. In the case of *Gonzales* v. *Ross*, a repealing law was passed at Moncloia, March 26, 1834, two hundred miles from Dolores, the place where land, on April 18, 1834, was granted to Gonzales: Held, there was no presumption, and it was not probable, that the act of March 26 was promulgated at Dolores prior to the 18th of April.

In the case of *Houston* v. *Robertson*, 2 Tex., 128, which was affirmed in *Gonzales* v. *Ross*, the court sustained a title granted under a law that had been repealed for five months, saying that on account of the unsettled condition of the country, like it was in our case, there was no presumption that the law had been promulgated. Therefore it is absolutely conclusive that the repealing law in our case was not published when our grant was made. On June 17, 1823, when the departmental assembly passed the supposed nullifying act, the repealing law of April 8, 1823, was then made known to them. They only say the law was repealed, they do not state when it was published, or that it had been promulgated at El Paso prior to the grant. This was then a declaration of the legislature of a province that an act of congress of the nation took effect when passed and not when published, as provided by positive

law. To show that this is an absurd proposition needs no citation of authorities. It must be conceded that when it is provided for by statute, as it was in Mexico, that laws did not take effect at any place until published there, then it is a condition precedent that all laws are void until legally published.

Sutherland on Statutory Construction, 129, 130.
Cooley's Constitutional Limitation, 6th Ed., 189, 190.
Welch v. *Battern*, 47 Iowa, 147.
Cain v. *Gode*, 84 Ind., 209.
Clark v. *Janesville*, 10 Wis., 119.

It is a well established principle that the repeal of a law does not take effect until published, and that all acts done in the meantime under law are valid and binding.

Allerton v. *Roberson*, 1 Dall, 8.
Morgan v. *Still*, 5 Binn, 28.
People v. *Trinity Church*, 22 N. Y., 44.

SECOND POINT.

Heath's grant being made and located according to law, was duly recorded within the archives of Mexico, as required by the treaty of Guadalupe Hidalgo and the decisions of the court of the United States.

The record of our case presents every link in the chain of perfect title. These several papers; the petition with decree approving the same, the order of reference to proper officers to survey and put petitioner in possession, report of these officers of their action in conformity to the order, with a complete and accurate map or draft of the survey of the land granted, the council's acceptance of said report, the decree of concession, all of which was entered in the record book of the acts of the honorable corporation of El Paso, and copies or duplicates of the same sent to both the governor of the province and the grantee, constitute a complete expedient within the meaning of the Mexican law.

U. S. v. *Moreno*, 68 U. S., 400–404.
U. S. v. *Knight. Adms.*, 1 Black, 245.
Hornsby v. *U. S.*, 77 U. S., 225–335–6.
U. S. v. *Morant*, 123 U. S., 335.

"The record of the grant made by the Ayuntamiento of El Paso called the protocol, the certified copy sent to the governor at Santa Fe, as well as the one given to the grantee, called the testimonials, are duplicate originals certifying the title to the land, and are evidence of such in any court.

"The copies made by the Spanish commandant from the protocol and certified to by him to be true and genuine, would be received in evidence in the courts in Spain as possessing equal claims to credit as the primordial or originals. For the same reason that those like these are certified to by

the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it. 2 Escriche Dic. de Leg., 185, and this court has uniformly received them as having the same authority."

U. S. v. *Davenport's Heirs*, 15 Howard, 1-6.
U. S. v. *Wiggins*, 14 Peters, 334-345.
U. S. v. *Peralta*, 60 U. S., 343-5.
Tex. Mex. Ry. Co. v. *Locke*, 12 S. W. R., 80.
Trinity Co. v. *Pincard*, 23 S. W. R., 720-3.

The learned counsel in court below argued: "Heath's grant is not valid because not duly recorded in the archives of Mexico." That our grant was nowhere recorded in Mexico, that its filing with the town council of El Paso del Norte and at Santa Fe in 1823 did not meet the requirements of the law, and they said:

"No record of a grant to Heath is found among the archives of New Mexico. This was not a record of the grant but a filing of the papers evidencing the incipient concession of the land. The record of the grant would be the expediente conferring the definite title. Nor would papers of any nature fouud among the records of the Ayuntamiento comply with the requirements of the treaty for a due record of the grant."

They seem to not have read the record in this case. If they had, they would have found, first, that our grant was in the United States Surveyor General's office in New Mexico and is No. 410 of the OLD SPANISH AND MEXICAN ARCHIVES. Second, that this grant is "a copy from the original in the record book of the acts of this honorable corporation. Juan Maria Ponze de Leon, Secretary." See page 170 of the record and page of our argument.

We submit these papers are evidence sufficient to establish the validity of our claim. The records at El Paso del Norte were mostly destroyed by the American soldiers in 1846-7. This fact has frequently been established, especially in the case of Juan Garcia and Hugh Stevens for a confirmation of a supposed grant for a portion of this land. See No. 6 claim 32 in the territory of New Mexico, report of Mr. Sandridge, p. 24-147.

This explains why the record cannot now be found at Juarez, Mexico. But it would be useless to get a copy from there if we could. It would only be the same as what is now in the public records—a copy, or one of three original duplicates of our grant. These papers having been handed down from the old Spanish and Mexican archives and now found in the United States Surveyor General's office for New Mexico, we submit are proper evidence under the act of 1891 and other laws of the United States. "All papers found in the Mexican archives in the custody of the Surveyor General of the United States are always evidence." 77 U. S. 235; 68 U. S. 404. In Perchemain's case, 7 Peters, 85, it was decided by the court that a copy of a Spanish grant, certified by a government secretary could be given in evidence without account-

ing for the non-production of the original, and this on general principles which did not require the aid of legislation.

U. S. v. *Wiggins*, 14 Peters, 345.

The expediente consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican Government is as much an original document as the grant, delivered to the grantee, and copy of the same in evidence.

Gregory v. *McPherson*, 13 Cal., 562–573–4.

Here, then, it is held that a copy of a grant *filed* in the archives of the Mexican Government, as ours was, is evidence, but we have not only the evidence that our grant was filed, but also that it was recorded "in the record book of the acts of the honorable corporation." This is proved by the certificate of the secretary as we have shown, and by the laws of Mexico at the time. Law 16, book 4, title 9, it is required that every act of the Ayuntamiento be recorded in a book kept for that purpose. It is presumed this law was obeyed.

"Such records and filed copies thereof have always been esteemed the highest and most satisfactory evidence of the facts which they recite because they are made by the direction of the law and are of public concern, and because they are made under the sanction of an oath and made at or about the time the acts which they recite transpired. They are retained in the custody of the functionary or department by which they are required to be kept, and are so retained for the express purpose of making them permanent and primary evidence of the transactions of the government. (1 Greenl. on Evidence, sec. 483.) Such a record can under no circumstances be called secondary or subordinate evidence, for there is and can be from the very nature of the case no higher evidence of the facts which it recites."

This question was discussed in the case of *Gregory* v. *McPherson*, 13 Cal., 570:

"It is true that it arose in relation to a grant made by the Governor, but we apprehend, for the reasons already suggested, that no distinction can be made between grants of that character and those made by Alcaldes. On the score of being official or authentic documents, which is the ground of their admission as evidence, they stand on a level. In that case a certified copy of the grant signed by the Governor and countersigned by the Secretary of State, annexed to and forming a part of the expediente, in the archives of the government, was offered in evidence, *and one question was, whether the copy in the archives of the government was to be regarded as primary or secondary evidence.* Upon this question the court said, 'We are at a loss to know upon what ground such a document can be denied the weight of original evidence.' It was made and signed and authenticated as a record by public officers in the discharge of public duties. The papers were retained in the custody of appropriate public officers for the purpose of proof—and the highest and most authentic proof—of their own action. The documents receive the stamp—and the most satisfactory stamp—of official authenticity.

The signatures are made on it as on papers sent out by the department. We cannot see why such papers should be called copies, or why, in the scale of proofs, they should stand in any subordinate relation to the paper handed to the grantee. If not counterparts or duplicates, it would seem that the original paper is the record retained by the department as a part of its permanent records."

Donner v. *Palmer*, 31 Cal., 510.

Then the record made by the Ayuntamiento at El Paso and the certified copy filed at Santa Fe are sufficient.

"Registered and recorded in some book of record now in the office, is satisfied by copies of deeds on sheets not bound or fastened together in any manner, but folded and filed in the archives."

Mumford v. *Wardnell*, 73 U. S., 422.

Airhart v. *Messieu*, 98 U. S., 491-501.

Our title having been found in the Mexican records, has been reported by the Surveyor General as a "grant" ever since the Gadsen purchase down to the present time. It is a public document, of which the commissioner of the general land office is the legal custodian. It is an archive or an original document of the Ayuntamiento, appertaining to the lands of the Mexican government, and is therefore legal evidence.

Williams v. *Conger*, 125 U. S., 397.

"The party who claims under a title archived in the General Land Office has also this difference in his favor, over one who claims under a copy directed to the interested party, that the officer to whom the copy was directed was the judge of its genuineness, and his action by virtue of such authority is evidence that in his judgment such decree, concession or grant existed; and this would afford strong if not conclusive proof of such fact. So that, upon the whole, it may be said that there is a strong if not conclusive presumption in favor of the existence of the originals and parts of originals of all titles on deposit in the general land office."

Paschel v. *Perez*, 7 Tex., 348.

THIRD POINT.

The Reign of Iturbide was a valid government, recognized by the United States in 1822, and our grant made by virtue of its laws, was not affected, annulled or destroyed by the revolution of 1823, and the overthrow of Iturbide.

The reign of Iturbide was not only a *de facto* but a *de jure* government. February 4, 1821, a treaty was concluded at the City of Cordova, between D. Juan Donohue, Lieutenant-General of the army of Spain, and D. Augustin Iturbide, and the "Plan of Iguala" adopted February 21, 1821.

By the treaty of Cordova the Viceroy, in the name of the king, his master, recognized the independence of Mexico, and gave

up the capitol to the army of insurgents, who took possession of it September 27, 1821. All opposition being ended, a provincial government was established which called a congress for the formation of a constitution. The throne was offered to Iturbide, who referred the offer to the Congress, and this body by a vote of sixty-seven to sixteen, declared him Emperor, under the title of Augustin I. He took the oath and was crowned July 21, 1821. The choice was ratified by the Provinces without opposition, and Iturbide found himself in peaceable possession of the throne.

History for ready reference by Larned, Vol. 13, p. 2,171.

Iturbide was not declared Emperor until the Mexican Crown had been declined by a Royal Prince of Spain.

Niles History of Mexico.

The government of Iturbide was recognized by the United States.

See report of James Smith Wilcox to the Secretary of the United States. State Papers No. 90, 1st Session of 17th Congress, p. 56.

This letter gives the actions and results of Iturbide's war in completing the independence of Mexico. Transmits the treaty concluded at the City of Cordova, and says that Don Juan Manuel de Elizalda is appointed Minister Plenipotentiary.

This is followed by the unanimous report of the committee of foreign relations, to which was referred the President's message concerning the recognition of the late Spanish Provinces in America, resolving that the independence of Mexico had been emphatically declared and practically established, and that she is eminently qualified to maintain the independence she has declared and now actually enjoys.

1st Session of 17th Congress, Vol. II, No. 73, March 19, 1822.
Annals of Congress, No. 39, p. 2,099.
Niles Register, Vol. 22, p. 60–3.

April 6, 1822. Letter of Secretary of State to Minister from Spain, notifying him that the independence of Mexico and other Spanish provinces in America, has been recognized, and that America will entertain reciprocal political and commercial relations with these powers.

Annals of Congress, No. 39, 17 Congress, 1821,1822, p. 2099, 2125.

Don Jose Manuel Zoyaya was presented by the Secretary of State and received by the President of the United States as Envoy Extraordinary and Minister Penipotentiary from Mexico with numerous suites of officers, December 14, 1822.

Niles Register, Vol. 23, p. 209, 240.

The reign of Iturbide and the independence of Mexico having been recognized and acknowledged by the United States, its ambassadors received, reciprocal, political and commercial relations carried on, the judiciary will not now deny that Iturbide's government was legal and valid, or to refuse to recognize laws passed and rights and titles acquired during the Empire of Iturbide, upon the pretext alleged by the defendant, that his government was an usurpation. This was a political question, and the United States having recognized Iturbide's reign, it is not for the judiciary to say that the Mexican Empire was illegal and void, or that the laws passed thereunder conveyed no titles.

Emperor of Austria v. *Day and Kossuth*, 3d DeGex, F. & J. Rep., 217.
Botiller v. *Dominguez*, 130 U. S., 238.
U. S. v. *Maxwell Land Co.*, 122 U. S., 365.
In re Ah Lung, 18 Fed. Rep., 28.
Foster v. *Nelson*, 2 Pet., 314.

The proposition that the acts done and the laws passed during the reign of Iturbide while he was *de jura* or *de facto* Emperor, were valid, and that the succeeding government by suspending, repealing or annulling his acts could not effect vested rights, is fully sustained by authority. The authorities quoted on the points, that a deed once recorded cannot be recalled or annulled, that a grant made under a law, reported before publication of the repealing act, is good and valid, are applicable to this proposition, and in further support thereof, we cite the following decisions:

"Even in cases of conquest it is very unusual for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which if felt and acknowledged by the whole civilized world, would be outraged, if private property should be generally confiscated or private rights annulled on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their rights of private property remains undisturbed."

U. S. v. *Perchman*, 7 Peters, 51, 86.
Delassus v. *U. S.*, 9 Peters, 118–130.
Strother v. *Lucas*, 12 Peters, 411.
Leitensdorfen v. *Webb*, 20 How., 177.
Langdeau v. *Hanes*, 21 Wallace, 527.

"In the case of conquest, it is undoubtedly in the power of the conqueror to destroy all the rights of the conquered; but in doing so the most flagrant outrage would be done to the moral sense of the age, and such as never would have been presumed to be perpetrated in the absence of the most positive and explicit affirmation of its author. The broad proposition that by a revolution all titles of land previously obtained were annulled and that none of them *proprio vigore* could have a standing in court; that to give them life and energy required the action or sanction of the political authorities of the new

government, and may be admitted to once have had a standing in the jurisprudence, but it has long since become obsolete. The recognition of such a doctrine now would shock the moral sense of the civilization of the nineteenth century. In the early ages when the rights of the common masses were but little considered and cared for, and all power and all rights were permitted to be disposed in an individual personal sovereignty, it is a melancholy fact the doctrine was too well sanctioned by the practice of kings and princes of those times. Then the houses and lands, flocks and herds, husbands and wives and children of a conquered country became the sport of the heartless conqueror. That age has passed away and a milder and more enlightened one has succeeded, in which the conqueror extends the arm of protection to the persons and property of the conquered citizen."

McMullen v. *Hodge*, 5 Texas, 33, 70, 71.

"There is no more firmly settled or universally approved principle of law than that the rights of private property are unaffected by change of government and allegiance affected by revolution."

Kilpatrick v. *Sisneros*, 23 Texas, 113, 132.

McMullen v. *Hodge*, 5 Texas, 34.

In the case of *Terrett* v. *Taylor*, 9 Cranch, 43–49, speaking of the attempt to take away by act of legislature property previously granted to the church, Judge STORY said:

"It was not in the power of the crown to seize or assume it; nor the parliament itself, to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. It was not forfeited, for the churches had committed no offense. The dissolution of the regal government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state was held. The state itself succeeded only to the rights of the crown; and we may add with many a flower of prerogative stricken from its hands. It has been asserted as a principal of the common law, that the decision of an empire creates no forfeiture of previously vested rights of property. *Kelly* v. *Harrison*, 2 Johns Ch., 29; *Jackson* v. *Lunn*, 3 Johns Ch., 109; Colvin's Case, 7 Co., 27. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution, any more than the property of any other corporation created by the royal bounty or established by the legislature. * * * If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of all land titles, and is utterly inconsistent to the rights of citizens to the free enjoyment of their property legally acquired."

Affirmed in *Town of Paulet* v. *Clark*, 9 Ch., 292.

The learned counsel argued in court below:

"Had the Ayuntamiento possessed the power to make the grant, or had it been approved by the Governor of the Province of New Mexico, the Supreme Government of Mexico would have possessed the power to annul the grant, which it exercised by the repeal of the law under which it was made."

That

"a repeal of a law under which it is made, annuls a grant" already made, is too absurd to need any argument. Will therefore ask the court to excuse the citation of a few authorities. If a state, by statute, gives property to an individual and he accepts it, a repeal of the statute would not deprive him of his property. Repeal of a statute or rendering it inoperative for the future, will not destroy an estate, already vested under it.

Den v. *Du Bois*, 16 N. J. L., 285.
Den v. *Fogy*, 2 Penn. R., 826.
Baygents v. *Beard*, 41 Miss., 531.
Dwares on Statutes, 675, 9 Law. Lib.

Some authorities quoted by defendant in court below, sustain that the political power of a government may affirm or disaffirm the acts of a preceding government. These authorities do not mitigate against the positions we argue. They all refer to incipient or imperfect acts of a preceding goverment, rendered under a particular constitution of Texas, and only hold that in case of an inchoate or incipient title, there must be some additional exercise of the granting power before the fee will pass. That is not our case. Here possession was given and the fee passed. Such a title is protected by the law, justice and right of both nations, and it was so provided in section 22 of Act of 1823.

The Constituent Congress of Mexico, April 11, 1823, suspended the law of 1823, but never at any time decided that a grant made under this law was void or of no effect. And the question for this Honorable Court is this: Is our grant made under the law of 1823, before the publication of its repeal or suspension, legal and valid?

Neither a repeal of a law, nor the declaration of the Mexican Congress that the law was illegally passed, could effect a grant made under the law before it was legally revoked. That is the question upon this branch of our case and neither the Constitutional Congress of Mexico, nor the counsels for defendants have denied this proposition. The law was passed under recognized authority. Iturbide was ruler *de jure* or *de facto*, therefore what was done at the time by virture of the laws passed under his reign, have been and must be sustained. "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, when the duties of the officer were exercised.

"Fourthly—*Under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.*"

5 American and Eng. Ency. of Law, 96 and note.
State v. *Carroll*, 38 Conn., 449.
The People v. *Lieb*, 85 Ill., 484; 138 Mass., 214.

The court of private land claims affirmed this same doctrine in the case of *Coe* v. *U. S.*, not published. Judge MURRAY said:

"It is said that Santa Ana was a usurper and that all his decrees were declared void by the Mexican government after he was deposed."

This could not affect the rights of the parties which attached under the laws in force at the date of signing the treaty.

Wheaton's International Laws, Sec. 31.

The constituent congress of Mexico never having decided that our grant was void although it may have subsequently repealed the law under which it was made, the argument and authorities quoted by defendants on page 38 of their brief, in lower court do not effect our case. The Mexican government by no competent authority, binding upon the United States or us, ever made any decision annulling our title. Reversing a case or deciding a law illegal does not make a grant made under the law when in force, void.

If as argued by defendants our title was annulled by the Mexican government, it is for them to show that it was done by *competent legal authority*. In this they have utterly failed. Under the laws of Spain and Mexico not even the king himself could have annulled Heath's title. Property could only be taken by action of the king and Cortes for acknowledged public utility upon a fair compensation.

Constitution, Title 4, C. 1, Art. 172.
Doe v. *Braden*, 16 How., 635–641.

The president cannot seize or embargo the property of any individual unless by virtue of a decree of congress.

Article 21, Sec. 3 of Mexico, Oct. 21, 1824.

Laws have no retroactive effect nor are they abrogated or modified without another posterior, and against their observance shall no disuse, custom or practice to the contrary be alleged.

Hamilton's Mexican Law, p. 1.

In the case of *Doe* v. *Braden*, 16 How., 635, a large tract of land had been granted by the King of Spain to the Duke of Alagon after negotiations had been commenced by Spain to cede Florida which embraced this grant, to the United States. The United States refused to accept the territory offered unless this grant and two others were annulled. Spain by official action of the King

and the Cortes revoked this grant for the reason that Alagon had justly forfeited his rights. That this grant had been forfeited and annulled by Spain was made part of the expressed treaty between the two nations. The question arose in the Supreme Court of the U. S. as to whether or not Alagon's title was lost. The court held that the question whether or not the King of Spain had power to annul the grant was a political question and was decided when the treaty was made and ratified. The decision was placed solely upon the ground that under the constitution the president and the senate had the sole power to make a treaty and the courts of justice had no right to annul or disregard any of its provisions. That as Alagon's grant was made null and void by treaty and the laws of the United States, he could not sustain his action. That it was for the president and the senate to determine whether the King of Spain had power to annul this title, and this they done in the affirmative when the treaty was made, and the courts have no jurisdiction to inquire into the matter. The whole case implies, that had it not been for the treaty and the action of the United States, Alagon's grant would have been sustained. Our case presents no such a record as found in this case. The treaty between Mexico and the United States does not destroy but confirms such titles as ours, and the defendants have not shown that said title was ever annulled or destroyed by either nation.

A repeal of a law can not divest rights obtained under a contract. A sovereign state cannot pronounce its own deed invalid.

Fletcher v. *Peek*, 6 Cranch, 87, 133-4-5-7.
Terrett v. *Taylor*, 9 Cr., 45, 292.
McGee v. *Matters*, 4 Wall., 143.
So. Pacf. R. Co. v. *Orton* 32 Fed., 457–478.
City of Brownville v. *Basse*, 36 Tex., 462.

Legislature cannot repeal a grant, conveying a present interest.

Hoffman v. *City of Quincy* 4 Wall., 535–549.

The law of 1823 is valid and was recognized by the confederate congress of Mexico. April 14, 1823, after the reign of Iturbide was overthrown.

This was a valid law promulgated during the short reign of Iturbide Augustin, emperor of Mexico, and was the first colonization law of Mexico. Very soon after it was passed the emperor was dethroned and the confederate congress of Mexico was organized. This congress, April 14, 1823, ratified Austin's contract made with emperor's government in consideration, it is said in the act of ratification, of its having been made in conformity with the colonization law passed by the junto nachional instituente; thus

recognizing the act of January 4, 1823, and other laws passed by the previous government.

Goode v. *Queen's Heirs*, 3 Tex., 241–250.
Decree confirming concession to Austin., Art, 35.
1 White's Rec., p. 594.
Early laws of Texas, p. 49.

FOURTH POINT.

The grant vested in Heath a title in fee in presenti, which must be protected under the treaty of the United States with Mexico and the laws of nations, unless it is shown that the land granted him has been lost or forfeited by some formal and regular proceedings of denouncement according to the laws of Mexico.

All admission found in the papers relative to possession and the character of our grant, and in truth all statement of facts in Heath's petition and the town council's decree, are to be taken as true. What is stated in either paper as to facts and intent must be admitted.

Glenn v. *U. S.*, 54 U. S., 250, 255–6.
U. S. v. *Reading*, 18 How., 1.
U. S. v. *Boisdore*, 11 How., 62–87
Hornsby v. *U. S.*, 77 U. S., 238.
Fremont v. *U. S.*, 17 How., 562.

In Reading's case, 18 How., 8–9, it was alleged in the grant that he was an American and had become a Mexican citizen. Held that the fact must be taken as true. Certain facts are established by Heath's petition and the decree thereon. Among these as well as others it is important to remember.

1st. Th at Heath was a Catholic is proved by the record. In his petition he says:

"The welfare of the soul being to me what I prize above all things, and as I unite myself with my brethren, the faithful people of this empire," he therefore asks this grant. The law under which we took the grant declared "the Roman Catholic Apostolic religion the established religion of the empire."

Heath's colony was to be composed of Roman Catholics.

2nd. That the transmission of the notice of the passage of the law of January 4, 1823, by the organic national junta, took sixty days to reach El Paso for publication, as appears in the recital in the grant. (See page 168 of record.)

3rd. That Juan Gid was Dr. John G. Heath is proved by map and certificate of surveyor W. Box, which was made part of the grant.

4th. That the chief executive had knowledge of Heath's pe-

tition which was sent to the executive prior to the enactment of the colonization laws, and that subsequently the Ayuntamiento was directed to carry out this law by making the grant to Heath itself. December, 1822, Dr. Heath applied to the executive for this same land under the laws then in existence. The petition was sent to the executive of the nation and is on file to-day in the City of Mexico, copy of which is in this record page. No answer was made to his petition until after the passage of the law of 1823. The governor of the province with instructions of the executive published the law of January 4, 1823, directing Heath to present his petition to the town council of El Paso; therefore, April 3, 1823, Dr. Heath petitioned the ayuntamiento of El Paso for the land now claimed. The same day the council allowed the petition, gave notice, and appointed officers to make a survey and put Dr. Heath into possession. Different steps were taken on different days, and the grant finally completed April 25, 1823. The survey was made with a great deal of care, a map of the land made and annexed to the papers for clearness and exactness in all time. The words of the conveyance are clear and distinct, sufficient to make a grant *in presenti* and not a contract for conveyance. The following are a few of its phrases:

BRACITO, April 17, 1823. The commissioners appointed by the decree of the honorable ayuntamiento, consisting of five individuals, for the purpose of executing the papers in the case, having accepted the charge, we proceed to this place where, in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid is to be placed, he, in sign of possession, with an axe cut the bark from two cottonwood trees, and when the wood of the trees was exposed wrote therein:

"Haza de Dr. Juan Gid" and the present year, on both of the trees.

Heath's petition asked that "a grant be made to him."

"Was to be placed in possession of the Bracito tract and given *absolute title thereto.*"

"Which tract was granted by this ayuntamiento to Juan Gid for settlement according as herein set forth."

"That Juan Gid holding the proprietorship of the lands of the hacienda, any of the inhabitants of this district desiring to remove to the Bracito for the purpose of settling at this place must arrange with him."

"That the land granted him outside of the said river prairie is deemed sufficient, etc."

The survey having been completed,

"whereupon the party interested, Juan Gid, was asked whether he was satisfied *with the whole survey made of the land* INTO FULL POSSESSION OF WHICH HE WAS TO ENTER, and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land, he was in all respects satisfied. With which understanding and there not having appeared any claims to suspend the carrying out of the proceedings, *this commission placed the said Juan Gid in lawful possession of said land.*"

"It being considered by this ayuntamiento that this case is concluded in which the land tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, therefore the fee on same will now be assessed."

When the grant was finished,

"the original was filed for perpetual evidence, and certified copy sent to his excellency, the governor of the province, and a like copy to the party interested, for his security."

We are clearly of the opinion that these words convey the title in fee; they are sufficient for this purpose as the granting clause in an ordinary deed. Legal title passed when the identification of the granted land became complete by putting the grantee into possession of the same.

Deseret Salt Co. v. *Tarpey*, 142 U. S., 241.
U. S. v. *So. Pacif. R. Co.*, 146 U. S., 570–593.
Borden v. *N. Pac. R. R. Co.*, 145 U. S., 535.
Schulenberg v. *Harriman*, 21 Wall., 44–60.
Right v. *Rosenberry*, 121 U. S., 488–496.
Southern Pac. R. R. Co. v. *Orton*, 32 Fed., 459.
Tubbs v. *Williout*, 73 Cal., 61.

The fee was vested on the day the grant was made, April 17, 1823. Art. 22, of the law of January 4, 1823, provides:

"The date of the concession of lands constitutes an inviolable law for the right of property and legal ownership. Should any one, through error or by subsequent concession, occupy land belonging to another, he shall have no right to it."

Hall's Mexican Law, p. 106, Sec. 277.

This grant has all the elements of a complete and perfect title. It was not a float, to be located within a large body, but a certain designated, fixed and marked tract of land, as we have shown. It was not a mere *executory* contract, or a contract to grant, but it was an absolute grant *in presenti;* grants of this character have always been protected by the courts of the United States under the treaties with Mexico and other nations.

Most of the land, we claim, was embraced in the treaty of Gaudalupe Hidalgo, February 2, 1848, the remainder came into the United States under the Gadsden purchase December 30, 1853. The Gadsden purchase adopted the provisions of Gaudalupe merely as to the protection of property.

Provisions of the treaties are familiar. See Treaties and Conventions of the United States with other Nations, p. 685.

The second section of the protocol, page 693, says:

"The American government, by suppressing the 10th article of the treaty of Guadalupe, did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunal."

While the last paragraph of this second article declares that

"Those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th day of May, 1846, were within the protection of the treaty."

Tex. Mex. R. R. Co. v. *Locke*, 12 S. W. R., 80.

Art. 5 of the treaty of 1853, page 696, adopts all the provisions of Art. 9, 16, 17 of the treaty of Guadalupe Hidalgo.

Art. 6. "No grants of land bearing date subsequent to treaty will be considered valid, or be recognized by the U. S., nor will any grants made previously be respected, or be considered obligatory, *which have not been located and duly recorded in the archives of Mexico.*"

This is clearly a treaty providing negatively that titles to land surveyed and recorded must be protected. Our grant was surveyed and recorded both in old and New Mexico in the year 1823 and remains on file in the land office at Santa Fe, New Mexico, at the present time, being among the papers found in the archives of Old Mexico.

U. S. v. *Clarke*, 8 Peters, 436–462–3.

Under the treaties and constitutional provisions the courts of the United States have always been liberal in construing contracts and protecting grants made under Mexican and Spanish laws. The cases are numerous from the earliest history of our country down to the present time which hold that all legal or equitable choate or inchoate titles derived from Spain or Mexico previous to their concession to the United States must be protected; and our courts have not only given a liberal construction to all such contracts, deeds and concessions, but have also been liberal in the presumption that a grant when once made is legal and that the officers in making it had authority to do so. Knowing that these cases are familiar, and that this honorable court has frequently affirmed the doctrine, we ask to be excused for the liberty of quoting a few of the many cases that are especially applicable to the points involved in this part of the controversy.

"The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Gaudalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow or illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulation of the treaty, the laws of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme court, so far as they are applicable. *They have not desired their tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just*

rights which could have been claimed from the government which they supersede."

U. S. v. *Auguisola*, 1 Wall., 352–8.

In *Hornsby* v. *U. S.*, 10 Wall., 237, it is said that it could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution.

In the case of *U. S.* v. *Moreno*, 68 U. S., 1 Wall., 404, speaking of the established laws for transfer of public lands in California, the court said:

"When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all land titles in California existing at the time of the concession of that country to the United States by the treaty of Gaudalupe Hidalgo. That cession did not impair the rights of private property; they were consecrated by the laws of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3, 1851, was passed to assure to the inhabitants of the ceded territory the benefits of the right of property they secured to them. It recognizes alike legal and equitable rights, and *should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.*"

In tracing the history of these grants, and the decisions of the courts made under them, the fact of a survey being made and possession being given, is always a strong, if not the chief, element in sustaining the claim. We have not found a single decision reported in the books, where, in any case, there was a complete judicial possession given, that the grant given by the Spanish and Mexican authorities has not been sustained. Our courts have invariably held that delivery of judicial possession was equivalent to livery of seisin, at common law, separating the land granted, from the public domain, and absolutely vesting the title in the grantee.

In support of this proposition we will quote a few of the many cases on the subject. The survey and possession of the land in our grant was as complete and perfect as that required in the following decisions:

In Fremont's case, 17 Howard, 554, the court says:

"But until the survey was made, no interest, legal or equitable, passed in the land. The original concession granted on his petition was the naked authority or permission, and nothing more. But when he had incurred the

expense and trouble of the survey, under assurance contained in the concession, he had a just and equitable claim to the land thus marked out."

In the case of *VanReynegan* v. *Bolton*, 5 Otto, 33, the court held that:

"Under the Mexican law when a grant of land is made by the government a formal delivery of possession to the grantor by a magistrate of the vicinage is essential to the complete investure of the title. This proceeding, called in the language of the country, 'the delivery of judicial possession,' involves the establishment of the boundaries of the land granted where there is any uncertainty with respect to them. A record of the proceedings is preserved by the magistrate, and a copy delivered to the grantee, and such lands are excluded from settlement under the pre-emption laws, so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States."

To the same point are the cases of

Graham v. *U. S.*, 4 Wallace, 261.
Malarin v. *U. S.*, 1 Wall., 289.
U. S. v. *Pico*, 5 Wallace, 289.
More v. *Stienback*, 127 U. S., 70–9.
U. S. v. *Morant*, 123 U. S., 225–236-241.
McMickin v. *U. S.*, 97 U. S., 204–215.

Again in the very recent case of the *Inter-State Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S., 569, the court said:

"It is contended that the case of *U. S.* v. *Arredondo*, 6 Peters, 691, govern this case in favor of the appellant. In that case, however, the grant to Arredondo was a specific tract of four square leagues, with the condition that he should establish a colony thereon. This condition was held a condition subsequent, and the title absolute. Survey was made and possession given. Neither does the case of *Gonzales* v. *Ross*, 120 U. S., 605, control this case; they are entirely dissimilar. In that case the grant was made under and by virtue of the laws of Coahuila and Texas, passed in 1832, and a commissioner appointed under that law put the grantee in possession of the tract, at the same time giving him the usual testimonial or deed. This court held that the grant was absolute in form and sufficient to pass the title."

Miller v. *Dale*, 92 U. S., 473.
U. S. v. *McLaughlin*, 137 U. S., 428.

All claims where efforts have been made to establish Mexican grants and failed have been defeated for the reason:

There was no survey and possession given, or there was no authority to make the grant, or the grant was a fraud, or that the grant had not been recorded in any of the public archives of Mexico, or there was no grant given, only a concession with certain conditions precedent, which never having been performed prevented the title from vesting. Our grant meets all these requirements and presents a claim which, under the laws of Maxico,

the treaty of concession, the decision of courts, and the statutes of congress should be confirmed. It is clearly distinguished from the class of cases which fail for some of the reasons just enumerated.

FIFTH POINT.

No denouncement or forfeiture.

Heath's title was not forfeited for the reasons:

FIRST. *The law of 1823 was repealed before the limit of two years for cultivation had expired, therefore his grant was relieved from any condition or penalty, as it is well settled that no fine, penalty or forfeiture can be enforced after the repeal of the law imposing the same.*

SECOND. *The revolutionary government having interfered with and prevented the performance of the conditions subsequent, the grant was thereby relieved of those conditions and became absolute.*

THIRD. *The law of 1823, having provided that the property of all foreigners who were Catholics should be protected, and Heath being a Catholic, there can be no disinheritance of his heirs by reason of he having died in the United States in 1851 after most of the lands came under the jurisdiction of the United States.*

FOURTH. *All of our grant lying north and north-east of the Rio Grande river, being a greater part thereof, came into the United States by the treaty of Guadalupe Hidalgo, and as Heath died after this treaty, the question that "Heath's heirs domiciliated in the United States could take no title to real estate in Mexico," which was so earnestly argued by the learned counsel in court below, does not arise, as this land at the time of his death was mostly within the territory of the United States.*

FIFTH. *The authorities of Mexico having interfered with Heath's possession and the performance of the conditions subsequent, by unlawfully forcing his abandonment under the threat of imprisonment or death, are estopped from claiming either forfeiture or abandonment on these grounds.*

SIXTH. *Under the laws, statutes, ordinances and decisions of Mexico, Heath's title could not be forfeited without some formal and regular proceedings of denouncement, and there never having been any such proceedings had prior to the treaty with the United States, no forfeiture can now be declared, and our title should be confirmed. Regrants do not preclude the judicial niquiry into claimant's rights against forfeiture.*

These propositions will be argued together.

If the suspension of the law of 1823 by the National Congress, April 11, 1823, was not after its publication, a repeal of the act of 1823, it can not be doubted but that the colonization law of Mexico, August 18, 1824, did repeal the colonization laws of 1823.

All decrees, regulations and Spanish laws prior to 1820, are held inoperative upon Mexican grants. See page 63, of this argument.

A new act in form of amendment or otherwise, covering the same subject-matter of the former, inconsistent with it, and intended to supersede and take the place of it, repeals the old law by implication. If it add offense and prescribe different penalties, then there is a repeal.

Norris v. *Crocker*, 13 How., 429, 455, 607.
U. S. v. *Claflin*, 97 U. S., 546.
W. U. Tel. Co. v. *Brown*, 8 N. E. R., 171.

Repeal of a statute imposing a forfeiture or fine operates to absolutely extinguish all penalties under such law, and after repeal no forfeiture can be enforced. The law must be considered as if it had never existed except as to transactions passed and closed.

Norris v. *Crocker*, 54 U. S., 429–436–7.
Yeaton v. *The U. S.*, 5 Cranch, 281; 6 Ch., 329.
State of Md. v. *B. & O. R. R. Co.*, 3 How., 534.
U. S. v. *Tyner*, 78 U. S., 88, 95.
Thompson v. *Bassett*, 5 Ind., 535.
23 Am. & Eng. Ency. L., 500.
Sedgwick's Stat. & Const. Law. p. 109.
Dwarris Stat. & Con., 160–676.
1 Kent Comm., 465.

This principle is absolute and universal, except where it has been abrogated by statute or constitution, providing that repeal shall not have effect to release or extinguish any penalty, forfeiture, etc., incurred under such statute.

National Bank v. *Lemke*, 54 N. W. R., 919.
Com. v. *Sherman*, 85 Ky., 686; 4 S. W. R., 790; 32 Fed., 722.

We do not argue that the act of 1823 is strictly a penal statute, but do say without fear of contradiction that the forfeiture clause of said act is *quasi penal*; that section 23 which provides for renouncement and resale after two years for failure to cultivate said land is a *forfeiture*, and must be ruled by the same general principle of law we have announced, which govern all other cases of fines, forfeitures and penalties. This forfeiture of our land was in the nature of a penalty, which was taken away by repeal of the act.

Ewell v. *Daggs*, 108 U. S., 143–151.

When a law is repealed it must be considered, except as to transactions passed and closed, as if it had never existed. Upon this principle the repeal of a statute puts an end to all criminal prosecutions and civil proceedings under the statute repealed. There can be no legal conviction in the criminal courts, nor any judgment imposing fines or forfeitures in the civil courts, after the law imposing the same has been repealed. In such case the courts have no jurisdiction. The statute becomes as if it never had been passed. The repeal obliterates the forfeitures and penalties of the statute, as if they never existed.

Hirschburg v. *The People*, 6 Colo., 145–6–7; 78 U. S., 95; 3 Howard, 534.
Van Inwagen v. *City of Chicago*, 61 Ill., 31–4.
Rood v. *The Chi., M. & St. Paul R. R. Co.*, 43 Wis., 146–153.
Butler v. *Palmer*, 1 Hill., 324.

It has been the universal rule to apply this principle of law to forfeitures imposed by statutes in matters of contract previously made in cases of forfeiture for breach of conditions subsequent. And such laws have been upheld as against all objections, on the ground that they deprived parties of vested rights or impaired the obligations of contracts, except in cases involving rights and interest which have accrued under it, and all matters and transactions passed and closed. Holding there could be no vested right in a fine, forfeiture or penalty until a final judgment imposing the same was entered under a law then existing.

Ewell v. *Daggs*, 108 U. S., 143–9, 150–1.
34 N. J. L. 193.
Thompson v. *Bassett*, 5 Ind., 536.
23 Am. & Eng. Ency. L., p. 500.

All these decisions and the principles of law decided by them are very applicable to our case. The grant was made and absolute posssession given, with no conditions except the proviso that in the event he did not, within two years from the date of concession, cultivate the land, "the right of property shall be considered as renounced, *in which case*, the respective ayuntamiento can grant it to another." Now it is evident from this, the cause of forfeiture would have to be found by the ayuntamiento before it could regrant our land to another. In this the ayuntamiento would act judicially. In all cases, when a debt, or penalty, or forfeiture is set up, the determination of the liability becomes a judicial question.

Ames v. *Port Huron Log Co.*, 11 Mich., 147.
Cooley's Constitutional Limitations, Sect. 363.

If, as held in the cases above, courts do not have jurisdiction to impose a fine or forfeiture when the law inflicting the same had been repealed, how can it be that either the ayuntamiento or any

other Mexican authority had any right to forfeit our grant, the act of 1823 having been repealed before the forfeiture occurred? The power to forfeit and sell was not to be exercised at the discretion of the ayuntamiento but upon an exigency, a failure on our part to cultivate the land granted, as it was only, "*in which case*," that any forfeiture occurred. A neglect to cultivate and the existence of the law declaring our failure a forfeiture, were pre-requisite and indispensable to the very existence of the power to forfeit, therefore, the law authorizing the forfeiture being repealed before it occurred, the power to forfeit never came into existence. This point is directly settled by authority. Proceedings for the sale of real estate of an intestate for the payment of debts were commenced before the repeal of the act of legislature of Ohio, the administrator notwithstanding the repeal went on to sell the land: Held that the sale was void, the power of the administrator to sell terminated with the repeal of the law. That it was not an independent power, to be exercised at discretion, when the exigency in his opinion may require it, but was conferred by the court, in a state of things prescribed by the law; the order of the court is a pre-requisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order be repealed, the power to sell can never come into existence.

Bank of Hamilton v. *Dudley*, 2 Peters, 492.

To the same effect:

Hartung v. *The People*, 22 N. Y., 95–100.

Van Inwagen v. *City of Chicago*, 61 Ill., 31.

Miller's Case, 1 Wm. Blackstone, 451.

The defendants may say, if, by virtue of the repeal of the law of 1823, the forfeiture could not be enforced, the grant also failed. But this is not correct; the authorities quoted hold that such repeal did not effect matters and transactions passed and closed, and therefore our title being a vested right remained.

A statute authorizing the laying of a tax was repealed after an assessment of such tax, and also imposed a penalty of twelve per cent. on failure to pay the tax assessed; held—that the tax could be collected, but the penalty could not, after the repeal of the statute. The rule being that the assessment of the tax was a thing passed and completed, and could not be affected by the repeal; contra with respect to the penal percentage.

The Town of Belvidere v. *The Warren R. R. Co.*, 34 N. J. L., 193.

The propositions we argue have been very forcibly and ably held by Chief Justice HORNBLOWER, of New Jersey. His language is very applicable to our case:

"1—Where one statute is repealed by another, *acts done*, in the meantime, while it was in force, shall endure, stand, and be good and effectual.

2—When an act of Parliament is repealed it must be considered, *except as to transactions passed and closed*, as if it had never existed.

3—The effect of repealing a statute varies according to its nature and object, and the circumstances of the case.

1—As if it be in the nature of a contract, or a grant of power, a repeal will not divest interest acquired or annul acts done under it.

2—If the legislature *ex mero motu* by statute gives to an individual property belonging to the state, and he accept it, a repeal of the statute would not deprive him of his property.

3—*For acts done or omitted under an existing law, subject to punishment or prejudice: if that law be repealed, the offender will escape the penalty.*

4—*When a statute restraining a man's natural rights or his use of his property is repealed he is restored to those rights.*"

James v. *DuBois*, 16 N. J. L., 285.

INTERFERENCE BY GRANTOR.

It is an acknowledged rule of law that if a grant is on a condition subsequent which is illegal, or its performance becomes impossible by the act of God, the public enemy or the grantor, then the grant is divested of said condition. If by reason of a change of government or officers or by reason of the subsequent hostility of the inhabitants of the province or by reason of anything done by the government, itself the grantor, the settlement of Heath's colony and the cultivation of the soil were prevented, hindered or rendered impossible and unsafe, then the estate, having previously been vested in Heath by survey and possession, was not divested by the failure of the performance of such conditions, but became absolute.

See authorities hereafter.

The action of the departmental assembly, see page 62, in trying to avoid Heath's title and directing the ayuntamiento to notify him not to come to Mexico, that the land it had granted him belonged to the jurisdiction of El Paso, and the law under which the grant was made being repealed, did prevent, hinder and excuse Heath from performing the conditions subsequent.

That this action of the assembly, together with the evidence produced, shows that Heath was hindered, interfered with and prevented from settling upon and cultivating this land, and that he took his property to Mexico and offered to perform in full his part of the contract, and was prevented from doing so by the grantor and finally driven out of the country under penalty of imprisonment or death.

The truth is, this grant was made under the laws of Iturbide, and after he was dethroned Heath's possession and rights were interfered with, under general policy of resentment against all the emperor had done—a resentment like most popular fury which was soon to give way to a gratitude which made the day of his death a public fete day for all time, the question is, Could these fickle and infuriated people destroy our title by killing the emperor?

We have shown that neither the action of the departmental assembly, nor any subsequent action of the government itself or its officers, could destroy the title that had vested. Trying to prevent us from occupying our grant according to its conditions, gave us this land unincumbered with conditions. That it did not operate to destroy, but to give additional life to our grant. No doubt the learned counsel for defendants may say, this proposition is inconsistent with what we have heretofore said: that we have argued that the action of the assembly did not destroy our title or affect our rights, and was therefore a nullity. But this does not necessarily follow.

The action of the assembly was a nullity in so far as attempting to revoke our title, because it had no jurisdiction in the premises for this purpose, yet it had the power and authority to release the conditions, and when they wrongfully prevented and hindered Heath and his followers, from settling upon the land in dispute for the reason to this extent they had jurisdiction. This land was within their province and territory, and they were in duty bound to give protection to all the citizens and their property.

The departmental governor and assembly were required to see that this law was enforced, and that all the contracts made under it were carried out; instead of doing so they sought to annul Heath's contract and otherwise interfere with him in occupying the land.

Again, it must be remembered that after our grant was made and before we went to locate and cultivate the land, and within the two years of grace we had, the system of donation of public lands in Mexico was by the act of 1824 changed by the general government giving power and control over the lands to the states; therefore the action of the departmental assembly in hindering and preventing us from cultivating our lands became the act of the grantor, but being illegal, they having no authority to undo what had been done, the land having been vested in Heath by grant and possession, their actions only gave him title absolute, relieved of conditions subsequent. That Heath paid the fees assessed for the land and was to considerable expense is proved by the record, page 167, also that under and in furtherance of said contract Heath, on June 17, 1823, had gone to the United States to procure his families, stores, etc., as is shown by the action of the assembly, for the ayuntamiento of El Paso was to notify him through the representative of the United States not to bring his colony to Mexico. There is no offer to pay back what Heath had paid or to indemnify him for the loss incurred. Could the Mexican government keep his money and the land both, and Heath not have a legal remedy to enforce his contract? That Heath did not get the notice of the action of the assembly until he arrived at El Paso we think is possible? He went there ready, willing, able and prepared to fulfill every part of his contract, and he spent in so doing some eighty thousand dollars as shown by the oral evidence. That he spent some time

in trying to occupy this land, that the authorities of the government in power then, after the revolution and death of Iturbide, would not permit him to remain and finally drove him off under threat of imprisonment and death, and that he came back to the United States a bankrupt. The evidence shows that the action of the departmental assembly June 17th 1823, was sent to the ayuntamiento at El Paso and is on record there, and it was no doubt by reason of this communication that Heath was not permitted to occupy this grant. Just what these fees were that Heath paid we have not been able to exactly ascertain from any information accessible to us. But from one grant we saw (cannot now call its name) made by the town council of El Paso about 1823, judging from the fees therein mentioned, at the same rate the fee in his grant would have been about $2,000. Whatever the fee was, it was not paid back. If so this record would have shown it. If there had been any mutual settlement, release or abandonment of this grant by Heath, these fees would have been paid back and release given of record.

SYNOPSIS OF EVIDENCE.

Our evidence taken on depositions upon orders of court corroborates the records and proves beyond all per-adventure of doubt:

FIRST. That immediately after this grant was made and Heath put into possession, he came to America, sold all his property, prepared his stores, provisions, goods, implements, people, etc., returned to Mexico, ready, willing and able to perform his part of the contract, taking possession of his land in 1824, with intent to improve and cultivate the same. (See depositions from pages 73 to 143 of the record.)

SECOND. That when Heath and parties with him arrived in Mexico, Iturbide's government was overthrown, the revolutionary parties then in power would not permit him to remain on his grant, and drove him off and out of the country, under the threat of imprisonment or death, upon the pretext that his grant had been made under the reign of Iturbide and that the law had been repealed.

Properly certified copies of deeds, show that on the 17th day of April, 1824, John G. Heath sold all his land in various counties of Missouri, being some six thousand acres, and also his slaves, preparatory to his departure to Mexico. This is doubly important for consideration, first: to show ability, and second, intention to do what he had promised. He then completed his preparations and started for Mexico, with the intent to remain and settle there, and cultivate and improve the land granted by the Mexican government in 1823.

Major Horatio H. Hughes, of Howard County, Mo.(page 114 of record), testifies:

"That he was well acquainted with Heath, that he knew of Heath's going to Mexico in 1821 or 1822, that he returned in 1823 or 1824 for the purpose of getting up a company to go with him to Mexico to settle upon and cultivate a tract of land near El Paso that had been granted him by the Mexican government. That Heath raised a company of one hundred and fifty or more men, women and children, and leaving old Franklin, Mo., started for Mexico going down the Missouri river to St. Louis and New Orleans. That they had with them a printing press, stores of all kinds, medicines, farm implements, machinery for the making of clothing and other machinery suitable to that age. That the affiant sold them a load of flour, loading the same onto their boats, and at the time and when they were leaving, Heath and others told him that they were going to Mexico to remain, become citizens, settle upon and cultivate land on the Rio Grande river near El Paso that had been granted to Dr. John G. Heath. That Arthur Sherman, ———Stewart and Moses Heath, his brother, went with Dr. Heath to Mexico, and in a year or so most of the party returned, and that when they returned, Dr. Heath and others said "when they got to Mexico there had been trouble, Iturbide's government under which the grant had been made, was overthrown. and that the revolutionary government would not let them remain on the land and settle there, drove them off under penalty of imprisonment or death, that the government as then organized tried to undo all that had been done under Iturbide's reign, and for the reason that his laws had been repealed, they would not allow Heath and his party to remain. That they had done all in their power to fulfill Heath's contract, but were not permitted to stay and returned to America bankrupt. That Heath's preparations and expenses must have cost him over sixty or seventy thousand dollars. That in 1847 as Captain in Colonel Donaphan's regiment the affiant fought a battle on the Bracito and knew at the time it was Heath's land, and when he returned to America often talked with Heath about the matter. Heath always claiming that the Bracito belonged to him, that the Mexican authorities had wrongfully drove him off of it, and that he hoped some day to get his land back."

Charles E. Woodroof (page 123) testifies:

"That he knew Dr. Heath and his family after 1836 or 1837. That Heath often told him about the tract of land called the Bracito on the Rio Grande river not far from El Paso, granted to him by the Mexican government through the Town Council of El Paso del Norte in 1823, that he had taken a company, provisions and stores there to settle in 1824, on the same and cultivate it, that when he got there, there had been a revolution and the authorities would not let them occupy the land, that they drove them off and would not let them remain, claiming that as the grant had been made under Iturbide's time, they could not remain. That Eliza Joseph and Robert J. Heath, children of the said Dr. Heath had often told him the same thing. That Dr. Heath and family could all talk Spanish, which they said they learned while in Mexico. That affiant was on the Bracito in 1846 or 1847, in Company "C" Missouri Infantry, commanded by Col. Easton and in Gen. Price's Brigade, and fought a battle or skirmish with the Indians there. From what Heath had told him affiant knew they

they were on his land, and so said to those with him. After returning from Mexico he frequently talked to Heath about the incident. That Heath tried to sell him his grant and they made some negotiations about it, but never entered into any written contract. He further said that after having seen the land, that if he at the time had the money he would have purchased. That Heath's heirs often talked with him and tried to arrange with him to go down and take possession of this land, but they did not, on account of the want of means and the hostility of the Indians at this time. Dr. Heath and heirs always claimed this land, and expressed the hope and belief that they would get it all right some day, as they said they had never abandoned it, but were driven off, had left from necessity under the threat of imprisonment or death, after they had tried faithfully to make it their home. That Dr. Heath was a shrewd, intelligent man, a leader of men all his life, was known both as a lawyer and doctor, and was said to be very wealthy before going to Mexico."

James Bryan, Esq.:

"Swears (page 119) that he is eighty-eight years old; that he knew Dr. John G. Heath from 1821 or 1822, to the time of his death; that in 1821–2–3–4, Heath was a very wealthy man, was always prominent and influential, was a member of the Constitutional convention in Missouri in 1820. That in 1824 Heath organized a company at Old Franklin to go with him to Mexico; that they came down the river in six or eight boats, about one hundred and fifty miles, stopping at the mouth of the Semosage Creek for a day or so; that Heath and his family, wife and four children, came out and stayed all night with affiant's father. That Heath bought three or four loads of flour and bacon which affiant helped to load onto their boats. There were over one hundred and fifty with him, men, women and children. While there a number of neighbors and friends joined Heath, and went with his company to Mexico, Jacob Dust, Charles McLain, Abraham Dust, with a family of ten or twelve, six or eight boys, and Abraham Zumalt and a large family. Zumalt and Abraham Dust did not return but stayed in Texas. Jacob Dust came back and stayed a while, then he and his family went to Texas, and he was the Lieutenant Dust who was killed in one of the massacres in Texas. Heath took with him to Mexico his wife and four children, two boys and two girls. The oldest was a boy named Robert. I saw them all at the boats in the river, and there were over thirty different families. Heath and the parties with him said at the time they were going to Mexico to settle, live on and cultivate his tract of land there. That I remember these facts and the time they occurred, for the reason that I got from Charles McLain when he went away, a fine, dark bay, blooded stallion. That I was then not of age, and my father helped me to get him, and McLain returned about two years afterwards and got the horse back again. That Heath and the others also returned and when they returned said, they were driven off the land and out of the country by the Mexicans, and were not allowed to remain there on account of a trouble or revolution in the Mexican government, the emperor having been killed. That before Heath left for Mexico he had a great deal of property which he sold—a number of farms in St. Charles county and town property in St. Charles, houses and lots, had several Spanish grants, valuable farm land near Herman, Missouri, salt wells, and a valuable tract of bottom land, 1,700 acres at the mouth of the Vous river. That he knew of Heath's lands from the fact of

being at the time a surveyor, and hearing his father and Heath talking about trades. That affiant was assistant and deputy surveyor in St. Charles county for over thirty years, and county surveyor in Vernon county, Missouri, for over fifteen years."

Mr. Bryan testified to many other important facts, especially in his cross-examination, to which the court's attention is directed.

Magdalena de Carranco (page 126) testified:

"That she lives in Victoria, Mexico, that she is over eighty-five years old, that in 1824 she lived at Soto la Marena, a port on the Gulf of Mexico. That she knew Juan Gid, or Dr. John G. Heath and family. That he came there in 1825 with many people, on their return from Mexico to the United States, that they had been up north at El Paso del Norte to settle on land there as they said, but had to leave and were on their way back to America. They stayed there quite a while, some of them working in the Salt Springs. That Heath was a man of sandy complexion, that he had his family with him, his wife and a number of children, boys and girls, and a great number of other families. That she worked for them and became quite well acquainted with Mrs. Heath. That this occurred about the time of the death of Iturbide. I remember this well, he being shot not far from there. The going back of Heath to America was in some way connected with the overthrow of Iturbide's government. Heath and company may have also been in Soto la Marena in 1824 and I not remember it, as it was only in 1825 on their return that I became acquainted with them."

Price Cooper (page 129) swears:

"That he is eighty-two years old, lives at Ysleta, Texas, that he knew Dr. Heath in 1822-23-24, met him during that period at El Paso del Norte and also on the land we claim. That he knew that in 1823 a tract of land called the Bracito on the Rio Grande River some forty miles northwest of El Paso del Norte, was granted by the Mexican government through the Town Council of El Paso to the said Dr. Heath or Juan Gid. That Heath was put into possession of the land in 1823, then went back to the United States to get persons to settle with him on said land. That he returned in 1824 with his wife, family and two hundred persons with him. They remained a short time on the land and after the death of Iturbide, they were driven off and returned to the United States. That he met Heath and others on this land in 1824. That Heath had brought with him many things, stores, provisions, machinery of all kinds, farm implements, plows, printing press, etc. That Heath was a man of light or sandy complexion, a little taller than ordinary size, was known as a lawyer and doctor, had with him his wife and four children, boys and girls, a boy ten or eleven years being the oldest. A man by the name of McLain and a brother of Heath's were in the party. Heath was forced to leave his land in 1824 or 1825; he was given a certain number of days to go away under the threat of imprisonment or death. These facts I got at the time from Heath, the Town Council and other officers of the government and the reasons given were that Iturbide and his government had been overthrown and that nothing done during that time should remain, that the law under which

Heath's grant had been made was repealed and for this reason they could not remain. That they returned to the United States by the way of Chihuahua and Soto la Marena, the way they came to El Paso del Norte. That when they were driven out of the country Heath left many things behind him, not having money enough left to take all back and at the time he said 'it had cost him many thousand dollars to get there and it would ruin and bankrupt him to go back. Many things that Heath had were taken from him by the Mexican Government and people and the affiant afterwards saw some of Heath's machinery at Chihuahua. The affiant further says that the Bracito was always known to every one in that vicinity as belonging to Juan Gid or Mr. John G. Heath from 1823 down to the change of government."

Don Geogonia Herera (page 132) testifies:

"That he is over eighty-one years, was born in El Paso del Norte, Mexico, now Juarez, where he lives at present. That he knows Juan Gid or Mr. John G. Heath in 1822-3-4, saw him in El Paso often and met him in 1824 on the Bracito, a tract of land granted to Heath by the Mexican government through the ayuntamiento of El Paso in 1823, that he went there at the time with his father, his uncle and several brothers and that a dog came out from the house and frightened the mule his uncle was on and he was thrown off the mule. That Heath and those with him did not stay very long on this land. After it was known in this country that Iturbide was overthrown, Heath was not allowed to stay on his land and was driven off by the authorities of the successful party of the government, who tried to undo everything that had been done under Iturbide's reign, and as Heath got his land under Iturbide's laws he was not allowed to remain but was driven off under the threat of imprisonment or death. When Gid, or Heath left here he went south of Chihuahua and Soto la Marena, said at the time as Iturbide was overthrown he could not remain, they would not let him. The particulars I cannot give further than I have stated, but I do know that Gid left and did not return to his land on account of the overthrow of Iturbide's government. Had no knowledge of the government by any official act of the executive ever annulling Heath's title, they only claimed as it was made under Iturbide's laws, Heath should not stay. In speaking of this grant from what he knew personally and heard from Ponze de Leon and others, the affiant said: "I knew that it was the general reputation that the grant was made in Heath's favor. I once saw Gid or Heath on this land as I have stated and I know it was the general reputation in all this country or neighborhood of the land from 1823 down to the change of government, that the said Juan Gid was owner of the same. It was always known by everyone as Heath's and it was well known that Heath's family and others with him were living on the land in 1824."

We have not been able to find anyone in Heath's company who is now living. After a period of seventy years, it was difficult to find the number of witnesses we did who had personal knowledge of any of the facts pertaining to our case occurring at that period, Robert J. Heath was the last of the Heath family to die. In May, 1882, he executed an affidavit before W. T. Ford, clerk of the Court of Parish of Gadd, State of Louisiana, relative

to the facts of Dr. Heath's expedition to Mexico in 1824 and his efforts to settle on this land, which was to be filed before the United States Surveyor general at Santa Fe, New Mexico, in support of the claim of the heirs of Dr. Heath for this land. We will show by authorities that this ex-parte affidavit is legal and competent evidence and will ask this Honorable Court to consider the same. Robert J. Heath (page 77) says:

He was a son of Dr. John G. Heath, that some time in the year 1822 his father became the owner through the government of Mexico of a grant of land located in the province of Mexico on the Rio Grande River not far from El Paso, known as the Bracito. That immediately after the grant, the grantee returned to the United States to organize a company in accordance with the provisions of the grant, composed of families, merchants, artizans and farmers, that he also employed a printer and purchased a printing press; also a large quantity of agricultural implements and machinery and all necessary supplies; and with the same went to Mexico, landing at the port of Soto la Marena. That the affiant was one of the party, that after their arrival the Emperor Iturbide was put to death when the country was thrown into a state of revolution. That the Mexican government as then organized refused to permit them to occupy said grant; that they remained in the country for a long time ready and anxious to cultivate and improve said land; that they offered to carry out all of the provisions and stipulations contained in Heath's conveyance; that after remaining some time the authorities of the government of Mexico ordered them to leave the country under pain of imprisonment, and they were compelled and forced by reason of such order to quit the territory of Mexico and return to the United States. The affiant further says that during their stay in Mexico they were persecuted and threatened and the grantee was robbed of all his property by the people of that government, and that the property so taken from him amounted to a sum not less than eighty thousand dollars. That affiant was with said expedition all the time it remained in Mexico and has personal knowledge of all the facts stated in this affidavit.

Mary R. Keedle, John B. Keedle, Eliza J. Bibb, Francis J. Heath, John Best, Esther C. Hunter, and others prove conclusively that the plaintiffs are the heirs and legal representatives of the said John G. Heath and are the only persons or parties intenested in said estate, and they corroborate the evidence of the above witnesses who testified directly to the facts given, by stating what Dr. Heath, Robert J. Heath and other members of the family always said as to their trip to Mexico, their object, purpose and intent. In substance they all said that Dr. Heath, his wife, his son Robert and others always told them that they went to Mexico in 1824 to settle on and cultivate a tract of land called the Bracito granted to Dr. Heath in 1823. That they arrived there in 1824, tried to hold, cultivate and occupy the same, that after the death of Iturbide and his overthrow, the government that succeeded would not let them remain, but forced them to leave upon threat of imprisonment, because the grant had been made during the reign of Iturbide. That Dr. Heath and heirs always claimed this land and hoped to retake possession of it some time when financially able.

HEARSAY EVIDENCE TO PROVE HEATH'S EFFORT TO SETTLE ON AND CULTIVATE THIS LAND.

We submit these depositions are all legal and competent and should be considered by the court. True, part of the evidence is hearsay, but it evidently comes under the exception to the rule that excludes hearsay testimony. Here the important questions to prove relate to settlement, citizenship, domicile, and declarations are always admissible for this purpose. Did Dr. Heath go to Mexico in 1824 to become a citizen of that country, to settle there and cultivate the land, did he voluntarily leave or was he driven out off the land and out of the country, or in other words did Heath abandon his land or was he banished from Mexico?

The evidence of the first seven witnesses giving facts, acts and incidents were declarations of Heath and others with him made in their preparation for and during their trips to and from Mexico is clearly admissible under a host of authorities. While the evidence of the other witnesses relative to abandonment or banishment is equally admissible, abandonment being a continued act—the motive, intent, cause and purpose of Heath's absence can be proved, and declarations showing these at any time are evidence. We admit that hearsay evidence is generally not admissible, but there are exceptions to this rule as well settled as the rule itself. Declarations in one's own favor, when accompanying some act material in issue and a part of the *res gesta*, are always ammissible to prove boundaries, pedigree, bankruptcy, domicile, etc. We shall discuss but one of these exceptions, domicile.

It is a general rule that declarations accompanying and explaining any action tending to throw light upon the intention of the person whose motive is in question, may be given in evidence, and greater latitude in admissions of declarations is allowed in cases of domicile than any other. In any case where the motive or state of mind in which any particular act is done is the subject of inquiry, declarations are admissible. Here, in our case, the important inquiry is, as to the motives of Dr. Heath in going to Mexico, becoming a citizen, taking up land and emigrating there in 1824 with his people, stores and implements, and his return shortly afterward to the United States, so as to determine whether or not he voluntarily abandoned his land and the country, or left there *ex necessitatus*, therefore his declarations when leaving or while making his preparations for so doing, or during his absence and the time of his return, as to his motives for going to Mexico and his reasons for not remaining and leaving there are admissible in evidence. Such declarations accompanying the act clearly belong to the *res gestae*.

Lund v. *Inhab. Lyngsborough*, 9 Cush., 36.
Greenleaf on Evidence, Vol. 1, Sec. 8.
Law of Domicile by Jacobs, Sec. 457.
Wallace v. *Lodge*, 5 Ill. App., 507.

Burgess v. *Clark*, 3 Ind., 250.
Thorndike v. *The City of Boston*, 1 Met., 242.
Woodworth v. *St. P. R. R.*, 18 Fed., 282.
Ennis v. *Smith*, 14 How., 400-422.

It has been uniformaly held that what a party says on leaving home or shortly previous thereto, or while on a journey, is admissible in evidence as a part of the *res gestae*.

Law of Domicile, Jacobs.
Reeder v. *Holcomb*, 105 Mass., 93-4.
Tait v. *Hall*, 12 Pac., 391 Cal.
Penna v. *Ravenel*, 21 How., 103.

Removal, with intent to remain, instantly changes domicile or citizenship; resigning professorship, selling property and at different times telling friends of the determination to remove, are held to be very strong circumstances and competent evidence to prove a *bona fide* intention to change and fix domicile.

Cooper v. *Galbraith*, 3 Wash. C. C. R., 547.

Domicile is controlled by intentions evidenced by declarations as well as by circumstances and facts. Letters and declarations made to friends are always regarded as clear evidence in respect to domicile.

Dupuy v. *Wurtz*, 53 N. Y., 556–562.
Dupuy v. *Seymour*, 66 Barb., 156.

Declarations made by a person at different times from 1818 to 1825, saying where his home was, was admitted upon objections. Affirmed, the court saying:

"We are of the opinion that the testimony objected to was properly admitted. It was part of the *res gestae*. The person being at F——, was setting out from there to go to some other place. *He declared where and for what purpose. His intentions can be known only to himself, except so far as they are communicated by his declarations, and these declarations are legal evidence of his intentions.* Where it is necessary to show the nature of an act, or the intention with which it was done, proof of what was said by the party at the time of doing the act is admissible. (1 Phil. Ev., 218.) Thus, under the bankrupt system, the declarations of a trader at the time of his absenting himself from home are received in evidence to show the motive for his absence. Had the person declared that he was going to consult Dr. Holland as a physician, the proof of such declarations would have been inadmissible. Of the same character in principle is his statement that he was going to Dr. Holland's because that was his home. Such declarations show the intent with which the act is done, and such evidence has always been received.

Gorhom v. *Canton*, 5 Me., 266.
Gable v. *Mays*, 17 At., 565 Md.
Story's Conf. of Laws, Sec. 45, note.
17 Meyer's Fed. Dec., 513.

Respondent prior to 1842 lived in Maine, went to Virginia with view of permanent residence, bought land there, brought part of his household furniture and daughter with him. His declarations made at different times were objected to as evidence; held, they were part of the *res gestae*, and clearly admissible as evidence in explanation of acts."

Burnham v. *Bangely*, 1 Woodbury & Minot's R. 7.

These decisions and principles have frequently been applied to sustaining titles to lands. The claim of Luco *et al.* for lands granted to Josi de la Rosa was rejected on the ground that the grant was fraudulent and antedated. Declarations as to the occupation and ownership of the ranch *pro* and *con* were admitted and considered by the court. It having been proved that Rosa made frequent declarations that he never owned a ranch or never applied for one. The court said the last evidence, however, is met on the part of the claimants by that of two witnesses, Yount and Botello. The first swears that some time in 1846 Rosa told him that he had a ranch; that it lay between Baca and Bidwell's ranch, and was called Pulpones. Botello swears that he remembers that while a member of the assembly he heard some talk of an application of Rosa for a grant; that he does not know whether he ever obtained the grant, nor was he informed of the fact until he recently saw the papers exhibited by the claimants.

Juan Lucca et al v. *U. S.*, Hoffman, 345-354.

In the case of *Lee* v. *Simonds*, 1 Oregon, 158, there was a dispute as to a homestead or residence. Simonds resided a short time on the tract of land in dispute in Oregon. Then he returned to the states. He was allowed to prove that he said when he started back that he was going after his family and intended to return, if he lived, but failed because his declarations did not show that he intended to reside or put his family on this tract of land when they came to Oregon. In our case there is no uncertainty as to the proof on any such points. We prove conclusively that Heath intended to settle and did settle on this identical tract of land, that he went to Mexico for that purpose and was driven off and had to leave the country, not from any fault of his. This case directly rules that our evidence is admissible.

Robert J. Heath's affidavit, as a sworn declaration, is legal and competent to prove every fact therein stated. It relates to Heath's domicil, intent and *bona fide* effort to settle in Mexico on his land and the reasons why he failed and was driven off. By the positive evidence of one of the actors, the supposed abandonment is proved to be a banishment. For this purpose under the authorities quoted declarations have always been received, and *ex parte* affidavits for the same purpose have been admitted in the following ten cases:

U. S. v. *Knight*, 1 Black, 250.
Doyle v. *Clark*, 1 Flipp, 536, 1 U. S. C. R.
Hamilton v. *Dallas*, 1 Ch. Division, 257.

In re. Gould's Will, 9 N. Y. S., 417.
In re. Zeragas' Will, 20 N. Y. S., 407.
McKensie v. *McKensie*, 23 N. Y. S., 278.
Morlon v. *Folger*, 15 Cal., 275.
Cornwall v. *Culver*, 16 Cal., 428.
Gardner v. *Cornell*, 5 La., 353.
U. S. v. *Boisdore*, 11 How., 89.

In the Knight case, which was a claim for a supposed Mexican grant, an *ex parte* affidavit of Davis was offered, in which the affiant stated that he had heard Knight say in the camp of Colonel Fremont that he had just returned from the lower country, where he had procured his title papers; that he exhibited certain papers, which witness did not examine; another witness testified that he saw Knight in Los Angeles, "and that he said he was there for the purpose of getting a grant for ten leagues of land on the Sacramento River, and that Governor Pio Pico told him that he had issued the grant." This affidavit and hearsay evidence were received and considered by the lower court and the Supreme Court of the United States.

The case of *Doyle* v. *Clark*, 1 U.S. C. R., 1 Flipp, 536, and 14 Myers Fed. Dec. 510, is important. An *ex parte* affidavit of counsel stating that plaintiff had told him that she intended to become a citizen of Michigan, was considered the important point in the case. The court admitted the rule that declarations of intention as to domicil were always admissible, but held that as the declarations in this case were made with a view of controlling the case were not sufficient to overthrow other facts which showed there was no real intention of removing—no sale of property, etc.

In the case of *Hamilton* v. *Dallas*, 1 Ch. Division 257, the question was whether a peer of the British Parliament could and did acquire a domicil in France. Held the test of domicil must always be the animus and the factum and could always be proved by circumstances, acts and declarations. Sale of property and preparations for leaving as shown in our case, were regarded as a controlling factor. Letters written and declarations made at different times showing his intentions were admitted and these were proved by *three ex-parte affidavits, one of which was an affidavit made by the peer and filed in a case against him by Albano*, in which he explains his residence in France and expresses his determination not to return to England.

These cases are conclusive upon the point that the declarations and affidavit we offer are competent and legal evidence to show that Heath did go to Mexico with intent to remain as a citizen, establish his home there and occupy and cultivate the land, and the further fact that he did not abandon his land, but that he was driven out of the country, thus explaining why he came back to America.

Now, in view of these authorities, every word of these de-

positions of Hughes, Bryan, Mrs. Carranco, Cooper, Herrera and Robert J. Heath are admissible. They testify to acts and declarations accompanying the *res gesta*, but to prove banishment or to explain the supposed abandonment the authorities recognize a wide latitude. For this purpose declarations need not be confined to any fixed or prescribed period. If, as we have shown, and that too by direct evidence that Heath did not abandon his land, but was driven out of the country, the banishment became a continued act, and declarations made at any time explaining the subject-matter clearly belong to the *res gesta*, therefore the depositions of our other witnesses are admissible.

Lund v. *Inhabitants of Tyngesborough*, 9 Cush., 43.

While absent the motive, intent, cause and purpose can be shown and declarations proving these at any time are evidence.

Lord v. *Colvin*, 4 Drewrys R., 366.

Any declaration made during residence abroad explanatory of it or of the present intention of the party regarding it, may be given in evidence. Removal and absence are looked upon as one continuing act.

Domicil by Jacobs, 453.
Greenleaf Evidence, Sec. 110.
Ransom v. *Hale*, 2 Bing., 99.

In the case of *Lick* v. *Diaz*, 44 Cal., 37 Cal., 437, the defendant was allowed to prove "that said Juan Prado Mesa before he died, made statements asserting title to the undivided one-half thereof," etc. Plaintiff excepted. Supreme Court held: "It is thus seen that in admitting in evidence the declarations of Mesa the court below but followed the views of the court, as expressed here in the former appeal, and which had become the law of the case upon the points in question."

In the case of *Tobin* v. *Wilkinshall*, 1 McAllister, 186, 5 Myers Fed. Dec., 765, the question arose whether Forbes, one of the defendants, was a citizen or subject of Great Britain. The judge found he was an alien. Motion to set aside the verdict on the ground that testimony as to acts and declarations of the party made and done *ante liter motam* tending to show what country he elected to adopt, were improperly permitted to go to the jury. To sustain that defendant was an alien, plaintiff proved that two actions had been brought in state courts against defendant; that upon petition alleging that defendant was an alien, the cases had been removed to Federal court; that a verdict had been given citing that defendant was a subject of Great Britain; that defendant's attorney swore to the fact. Also, it was testified by a witness that in 1851 defendant *told him he was not a citizen of the United States; that he did not intend to become one*, because he wanted to be able to litigate in the courts of the United States. This

testimony was objected to as incompetent, and the objection overruled. The court held: It is settled that the declarations and acts of a party are admissible to qualify and explain his intentions in removing and the character of his residence in a question of domicil. In the case of *Inglis* v. *Saylors Snug Harbor*, 5 Peters, 123, the court say:

"It surely cannot be said that nothing short of actual removal from the country, before the Declaration of Independence will be received as evidence of election. And proceeded to consider the acts of the party adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts besides that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar defendant remained in this country, and to ascertain his intentions in remaining, his acts and declarations, though made subsequent to the time, were left to the jury to find in what manner he had elected."

In question of abandonment wide range and great latitude is always allowed. Courts never refuse facts, declarations and circumstances from which any aid for the solution of the question can be derived. Proof of any claim to the property, no matter how manifested, is admissible. We have proved by all our witnesses that Heath claimed and asserted an ownership over this land; always said he owned it, and had not abandoned his claim, and hoped that the wrong which had been done to him in being driven out of the country would be righted some day. This was his talk to all the witnesses we have called. Major Hughes and Mr. Woodruff were on this land in 1847, knew at the time it was Heath's land, and so told those who were there. Then, when they returned, talked to him about his ownership, and Heath tried to sell the land. That these acts and declarations were all legal evidence to prove there was no abandonment is clearly sustained by high authority.

In the case of *Bell* v. *Bed Rock T. & M. Co.*, 36 Cal., 216, the plaintiffs offered to prove that one Williams proposed to purchase the claim in dispute from them, and that they refused to sell. Defendant objected upon the ground of irrelevancy. Court said:

"As we have held in the case of *St. John* v. *Kidd*, 26 Cal., 263, in order to sustain an allegation of abandonment, it must appear that there was a leaving of the claim without any intention of returning or making any further profit. The leaving being established, it is competent for the aforesaid party to show any acts explanatory of the leaving which tend to show that it was not accompanied with intent not to return. Thus in *Richardson* v. *McNulty*, 24 Cal., 339, we hold a judgment roll in an action by Richardson to recover the same ground against other parties was admissible upon the question of the intent with which he had left the ground, and tended to show that he had not left with the intent not to return. We also hold the same doctrine in *Wilson* v. *Cleveland*, *supra;* and in conclusion said: Upon a question of abandonment as upon a question of fraud a wide range should be allowed, for it is generally only from

facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove all facts or circumstances from which any aid for the solution of the question can be derived."

Again we say all the evidence we offer is admissible and sufficient because in equity courts the rule of evidence is always more liberal than in law courts. The disposition of this honorable court and all others is to be very liberal (and rightly so) in permitting evidence to establish old Mexican titles. At this date it is difficult to find many witnesses who took an active part in the scenes and incidents of those days when these Spanish and Mexican grants were made. When supported by the records, few facts and circumstances should be sufficient to have them confirmed. Under the statute of 1891 these claims are to be determined by equity, justice and the laws of nations. The tribunals of the United States, in passing upon the rights of property claimed under grants from the Spanish and Mexican governments, are governed by the stipulations of the treaty, the law of nations, the laws, usages and customs of former governments, the principles of equity and the decisions of the Supreme Court. They are not required to exact a strict compliance with every legal formality.

In the case of *U. S.* v. *Johnson*, 1 Wall., 326, the court said:

"In taking objections to these Mexican grants it ought to be remembered that the case is not brought here on a writ of error with bill of exceptions to the admission of every item of testimony offered and received below. *Nor is it a part of the duty of counsel representing the government to urge microscopic objections against an honest claimant and urge the forfeiture of his property for lack of proof according to the strict rules of common law.*"

In *U. S.* v. *Auguisola*, 1 Wall., 352-8, Justice Field, affirming the Johnson case, added:

"The United States government never sought by their legislation to evade the obligations devolved upon them by the treaty of Guadalupe, Hidalgo, *to protect the rights of property* of the inhabitants or the ceded territory, or to discharge it *in a narrow and illiberal manner. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they succeeded.*"

Conditions of cultivating and occupation relieved by acts of grnator on account of subsequent revolution preventing performance.

Performance on our part was attempted in good faith and at great costs, and full performance was prevented solely by the act of the granting government, by its officers, after a revolution boldly repudiating and denying the grantee's rights. This brings our case within the *cy pres* doctrine in equity which has been ap-

plied so often, namely: performance, as far as possible, followed by hindrance and prevention on the part of the grantor, relieves the grant of the forfeiture and therefore our claim should be confirmed.

U. S. v. *Arredondo*, 6 Peters, 691.
U. S. v. *Sibbald*, 10 Peters, 13–323.
U. S. v. *Larkin*, 18 How., 557–563.
U. S. v. *Fremont*, 17 How., 542; 1 Hoffman, 20.
U. S. v. *Reading*, 18 How., 1.
Glenn v. *U. S.*, 13 How., 250–259.

But it is claimed by the defendants that under the statutes of 1891 no grant, containing conditions, when said conditions have not been complied with, can be confirmed. The gentleman's contention is not correct as a matter of law, and when applied to our case is not supported by the record. Here now there is no condition, and our grant contained none when our land came into the United States. There is no condition precedent or subsequent in our grant. The act of 1823 did impose a subsequent condition of forfeiture, but that was destroyed, blotted out by the repeal of the law. It was then that all conditions or requirements of our grant, if any, were annulled, the same as if they never existed.

Authorities on p. 96 of Argument.

Again this original condition of subsequent cultivation was waived and excused by the acts of the grantor and for this reason was the same as though it never existed. No act of Congress, by implication or otherwise, can revive or put into effect a repealed law of Mexico. The condition of our title at the date of the treaty must determine our right—there being then no operative condition to effect our title, our grant should be confirmed. As conceded by the counsel, "the United States government has no right to prescribe terms and conditions not consistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded country." To attempt to impose a limitation upon the Heath grant, and refuse its confirmation by reason of a condition which had been excused, annulled or repealed by the acts of the Mexican nation, would be illegal and void according to the laws and constitutions of Mexico and United States and the treaty between the two nations.

In construing the treaties of the United States with Mexico, it has frequently been held that the showing of any legal or equitable excuse for the non-performance of conditions subsequent always entitled a claim to confirmation. This is the well settled rule of construction of the treaty of Guadalupe Hidalgo, and is the established rule of the acquisition of all property under the treaty. The contention of the defendants would destroy this rule

as well as many valuable property rights in New Mexico and other territories.

The act must be construed as a whole, and as such it requires this court to decide all claims according to equity, justice and right. The decisions hold that in equity, excuse for non-performance of conditions subsequent is equivalent to performance.

Again, the position of defendants when applied to concessions, imperfect or incipient donations, when by reason of conditions never having been performed, no title ever inured may be correct, but as to perfect titles where the fee was vested in the grantee subject to the possibility of forfeiture on account of a failure to do something, their contention is not applicable to this last class of cases, the provisions of the eighth subdivision of section 13 of the act creating this court does not apply. That this subdivision has reference to incipient, inchoate titles only, is plain from the language used. "No concession, grant or other authority TO ACQUIRE LAND" is the language of the section. It is manifest the word "grant" is not used here in the sense of anabsolute title.

Our rights are not based upon a concession. We are not claiming a right "*to* acquire land," but are asking this court to say that Dr. Heath did acquire this land by the grant of 1823, and we want our title thereto to be quieted as against the United States. We claim under section 8 and not under section 6 of the act of 1891. We are informed that the United States Land court has sustained this construction of the act of 1891 in the case of *Coe* v. *The U. S., and other* cases.

We submit there is nothing in this act which requires the court to depart from, or waive the application, of the high principles that have characterized the legislation of our government, and the judgment and decrees of our courts, in respect to property rights in ceded territories, and so believing, will proceed upon the theory that this court will accept and receive all evidence which tends to prove any waiver or valid, legal or equitable excuse for the non-performance of conditions subsequent.

In *U. S.* v. *Vaca*, 18 How., 556, the court said:

"It is a condition subsequent, which at the worst only left the title of the grantee open to be denounced, but as the claimant was *hindered from performance by the revolutionary state of the country, the non-fillment of it would not work forfeiture of his title.* By the 14th section of the act of March 28th, 1804, which established the territories of Orleans and Louisiana. Clamorgan was prevented from doing any future act in support of his title, had he been disposed to do so. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment."

Glenn v. *U. S.*, 13 How., 249.
U. S. v. *Larkin*, 18 How., 557.

In the case of *Fremont* v. *The U. S.*, 17 How., 506, it is said:

"Regarding the grant to Alvardo, therefore, as having given him a

vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach in the conditions annexed to it, during the continuance of the Mexican authorities. which forfeited his rights and revested the title in the government. The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it within the time limited within the conditions. It is a sufficient answer to this objection to say that negligence in respect to these conditions and others annexed to the grant does not of itself always forfeit the right of the grantee." Affirmed in *Reading* v. *U. S.*, 18 How., 6.

In *U. S.* v. *Arredondo*, 6 Peters, 697, it is said:

"The condition of settling two hundred families on this land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance and divests the grant of that condition. It is an acknowledged rule that if a grant is made upon a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling two hundred families has been or is impossible; the condition was not unreasonable or unjust at the time it was proposed. Its performance would probably have been deemed a fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the *summum jus* indeed, and enforcing a forfeiture of principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. *If the case required it, we might feel ourselves at all events justified, if not compelled, to declare the performance of this condition had become impossible by the act of the grantors, the transfer of the territory, and the change of government, manners, habits, customs, laws, religion, and all the social and political relations of life and of society.*"

The case of McMicken v. U. S., 97 U. S., 204–214, makes a distinction between conditions precedent and subsequent and perfect and imperfect titles, holding that the conditions of inhabitancy and cultivation annexed to imperfect titles were always considered as material and essential; then discussing conditions in complete title said:

"We have been referred to some cases decided by this court which are supposed to treat the conditions contained in these titles as of no importance, and as not necessary to be performed. But it will be found that these cases related to perfect grants or that they are otherwise distinguishable from cases like that now under consideration."

Then affirming many of the cases we have quoted, said:

"There is nothing in any of these cases inconsistent with the assertion of the forfeiture in the case before us. Here no title was granted; nothing but a permit to inhabit and cultivate, as preliminary to a grant. It might have ripened into an equitable title had the conditions been fulfilled, *or even if a fair effort had been made to fulfill them, or if any plausible excuse could be offered for their non-fulfillment. But no attempt even appears ever to have been made to fulfill them.*"

The authorities are very numerous which hold that all acts on the part of the grantor, which interfere with, hinder or prevent performance of conditions precedent or subsequent, will avoid the conditions, excuse performance and render the grant absolute.

Washburn on R. P., 4th Ed., 453–4.
Freeman on Real Property, Sec. 27 1, 3-4.
4 Keat's Comm., 130, 3 Wait's Actions & Defs., 74.
Puffendorf, 307; 1 Bacon, 680.
Leading cases on Am. L. R. P., 146.
Houghton v. *Steele*, 58 Cal., 421.
Jones v. *Chesapeake R. R. Co.*, 14 W. Va., 514.
Jones v. *Walker*, 13 B. Mon., 163.
Jones v. *Bramblet*, 1 Scammon, 276 Ill.
Young v. *Hunter*, 2 Selden, 203.
Majors v. *Hickman*, 2 Bibbs, 217.
Kuidekoper v. *Douglass*, 4 Dall., 392, 3 Ch. 1.

The conduct of one party to a contract which prevents the other from fulfilling his part is an excuse for non-performance.

Addison on Contracts, Sec. 326.
Fleming v. *Gilbert*, 3 Johns, 527 N. Y.
Ketchum v. *Zeildorff*, 26 Wis., 514.
Benj. on Sales, 4 Art., pp. 640-511 and 566.
Texton v. *Hutchings*, 62 Md., 150.

It is expressly provided by the laws of Mexico that a condition will be held as fulfilled, which fails to be realized by the act of the obligated party.

Hall's Mexican L., p. 629, sec. 2481.

If there had been a forfeiture and the party entitled thereto, either expressly or by his conduct, waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by releasing against, it if necessary.

Pomeroy's Equity Jus. Sec. 451.

It is held that when a condition subsequent is once dispensed with, the estate becomes absolute in the grantee, and cannot be divested by any future breach. If dispensed with in whole or part, it is gone forever, and there can be no right of entry for any subsequent breach or delay.

44 Am. Decisions, Note page 748.
Dumpors case, 1 Smith's Leading cases, 85.
Ludlow v. *N. Y. R. R. Co.*, 12 Barb., 440.
Clark v. *Jones*, 1 Denio, 516.
Wait's Actions and Defense, p. 74.
Dickey v. *McCullough*, 2 W. & S., 88 Pa.
Sharon Iron Co. v. ....., 44 Pa., 341.
2 Am. Leading Cases, 629.

Ely v. Cole, 2 Gilman (Ill.) 573-4

This proposition has never been denied, yet was limited in the case of *Davis* v. *Gray*, 16 Wall., 203, by the court holding and incidental that when the hindrance by the grantor was of a temporary nature, as it was in that case, the building of a railroad in Texas being suspended by the war of 1861, and not a direct wrongful act of the grantor, equity would not apply the rule of blotting out the conditions forever, but would only excuse performance for the time being.

This doctrine has no applicability in our case. Here the excuse, or the prevention and hindrance, were absolute and continued; so, too, was its operation and effect. Here the adverse action was by the grantor against the grantee, and the prevention was not incidental and growing out of the turbulency of the times, but a direct personal interference with by the party to whom the promise was made defeating the promise. The court in affirming our position, said:

> "The rule of law is, that if a condition subsequent be possible at the time of making it and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested is not thereby divested but becomes absolute. The analogy of that rule applied here would blot out these conditions. But this would be harsh and rank injustice. Equity will therefore not apply the rule to that extent. It will regard the conditions as if no particular time for performance were specified. In such case the rule is that the performance must be within a reasonable time."
>
> *Davis* v. *Gray*, 16 Wall., 230.

This rule can not be applied to our case, and it is manifest that nothing here said militates against our claim. Heath tried to perform his part of the contract, he went there in time, ready, willing and able to do all he agreed; he stayed two years, spending a large sum of money in trying to occupy this land, and was prevented from so doing by hindrance and obstacles interposed by the grantor, actually precluding or preventing performance by him. This interference was absolute, as Heath was finally driven from the country a bankrupt, under threat of imprisonment or death. Under all the authorities, what he had done gave him the land forever.

The case of *Davis* v. *Gray* is discussed by his Honor, Judge Harlan, in *Farmers T. & L. Co.* v. *Chicago, P. & S. Ry. Co.*, 39 Fed., 143–152. The principles held in this case as well as those established in its reversal are important to us. *Angle* v. *Chicago & St. Paul Ry. Co.*, 151 U. S., 1.

By act of March 4, 1874, the State of Wisconsin granted certain lands to a railroad called the Omaha Company, and certain other lands to the Portage Co., upon conditions: Subsequent to building and completing the road in five years, March 16, 1878, time extended three years. In the panic of 1873–74, Portage Co. broke down and remained inactive until 1880. Afterwards made some arrangements with capitalists to carry on the enterprise. The

Omaha Company conspired with the other parties to wrest from the Portage Co. its land grant, got control of its stock, causing the work that had been commenced to be suspended; then got the legislature of Wisconsin to pass an act forfeiting the grant to the Portage Co. and bestowing it upon the Omaha Co. Judge Harlan did not think that annulling the grant made to the Portage Co. brought the case within the rule of the Davis case; that when a condition subsequent became impossible by the act of the grantor, etc., the estate being once vested is not thereby divested by the failure, but becomes absolute.

He further said that this rule cannot be applied to the preseut case. It is not to be disputed that the revocation of the grant to the Portage Co. had an injurious effect upon its creditors. But in a legal sense, such revocation by an unconstitutional, void act of legislature—which the plaintiff affirms the act of February 16, 1882, to be—cannot be said to have made impossible the performance of conditions upon which the company's title to the land depended." This opinion was reversed by this court holding that the repeal of the grant, as well as many other acts done, did hinder, delay and prevent the carrying out of the contract on the part of the Portage Co. and that on account of these wrongful acts, all the wrong-doers were estopped from taking advantage of the non-performance of any condition subsequent.

151 U. S., 1–27, where both opinions are reported.

Equity will not apply the exception, to the universal rule adopted in the Davis case, to our case. If by reason of the revolution, or for any other unjustifiable cause the Mexican authorities prevented Heath from settling on his land and fulfilling the conditions of his contract, why should not these conditions be blotted out forever? Here no question of performance in a reasonable time could arise in equity. He was not driven out temporarily, but banished forever. He had spent his fortune to get there, and went home a bankrupt. It cannot be held he was required to return. The government of Mexico having done the wrongful act, is ever after estopped from taking advantage of its own wrong. Mexico could not "*play fast and loose*" with Heath by dispensing with the condition at one time and insisting upon it at another. Dumper's Case, 1 Smith's L. C. 85, 44 Am. Dec., 748.

Marshall v. *Craig*, 1 Bibb., 379, 4 Am., Dec., 647, is in point, where it is held the purchase of Briscoe's claims was a wrongful act. That this purchase was a *perpetual bar* of his right against Craig, and operated as a total discharge of Craig, seems to follow from settled principles of common law, and being made so by the act of the obligee himself, the obligation is discharged *forever*.

Shep. Touch., 393—Co. Litt., 206.
People v. *Cook*, 30 How. Pr., 110.

The question to be determined by this court is, could the Mexican government, at the date of concession of this land, have re-

fused this title upon the principles of right, law and equity? From the facts as we have shown them, that government was estopped from pleading either abandonment or forfeiture or laches. So, too, is the government of the United States; the court cannot inquire into any act or omission by the grantee since the Mexican authorities were displaced. It is not authorized to pronounce a forfeiture for anything done or anything omitted by them since that period.

Hornsby v. *United States*, 77 U. S., 239.
McMicken v. *U. S.*, 97 U. S., 217.
U. S. v. *Sutter*, 21 How., 178.
New v. *U. S.*, Hoffman 162.
U. S. v. *Clarke*, 16 Pet., 218–225.
6 Pet. 706; 7 Pet. 51; 10 Pet., 321.

LACHES.

Defendants knew of our title, and were bound to take notice of the record, and with this knowledge cannot rely upon any charge of laches. A trespasser with knowledge cannot plead laches.

McGee v. *Chadron*, 30 Tex., 644–661.
Howard v. *Perry*, 7 Tex., 266.
Morris v. *Byers*, 14 Tex., 278.
Ferris v. *Coover*, 10 Cal., 589–632.

We concede that if Heath had not attempted to fulfil his part of the contract the forfeiture might be enforced, but we insist that the Mexican Government, having prevented that performance, is now estopped from asserting it, and equity will aid Heath by relieving against the forfeiture; and in such case hindrance prevents the operation of laches.

1st Pomeroy's Eq., Section 451.

The courts all hold that forcing a party to leave the country cannot operate to his prejudice, and that a man forfeits no right who flies from the strong arm of power.

Stark v. *Mater*, 1 Walker, 183; 12 Am. Dec., 553.
Handy v. *DeeLeon*, 5 Tex., 211.
White v. *Burnley*, 20 Howard, 250.

There was no abandonment, the premises not having been left voluntarily.

Moon v. *Rollins*, 36 Cal., 339.
Pothiers Treaties on Possession Ch. 5, Act 7, Sect. 2.

Upon this point the language of the court in *Stark* v. *Mater*, *supra*, is very applicable to our case:

"Shall therefore the absence of these parties of necessity, and not of choice, be held by us to defeat a right, founded in justice and equity, and which had actually vested in him, and had never in any legitimate way by

any competent authority been vacated or annulled? We think not. It would be to make this court the hand-maid of oppression, a chancery to consecrate the wrongs and enormities of a licentious power."

"The doctrine of laches has no just application to this case. It is applied by analogy to the statute of limitations, to promote, not to defeat justice. The patent certificate and the mortgage were on record in the office of the register of deeds in the county in which the lands were situated. He took the land with the actual and constructive notice of the material facts in which the equitable rights of the appellee rest."

Bogan v. *Edinburgh Am. L. M. Co.*, 63 Fed., 192-9.

Complainants in an equity suit are not chargeable with laches caused by the defendants themselves.

Gunter Carroll, 101 U. S., 425–7.
Ridgway v. *Wharton*, 6 H. L. Cas., 292.
Fry on Specf. Perf. Sect. 1114.

If plaintiff's delay has been caused by this act of defendant, the latter cannot plead the plaintiff's laches as a bar to the suit.

12 Am. & Eng. Ency. S., 560.
Sugg v. *Thrasher*, 30 Miss., 135–142.

If Heath was driven out of Mexico, then there was no breach of contract on his part and no forfeiture occured, and there could be no laches envoked against him, unless there has been a breach or forfeiture.

Am. & Eng. Ency. of L. V., 567.
Town of Middleton v. *Newport*, 15 Al., 800.

The principle of estoppel is applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title and does not interfere to prevent the work or inform the party of his own title. This would be a fraud, and the owner would not afterwards be permitted to receive the property, without at least making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the character of the title, and *a fortiori* where the owner was not present but unlawfully banished, the court leaving his title of record to speak for him. He who makes improvements with knowledge of another's title, is wilful and acts at his peril.

Steel v. *St. Louis Smelting Co.*, 106 U. S., 447–56.
Brant v. *Virginia C. & I. Co.*, 93 U. S., 326, 337.
Henshaw v. *Bissell*, 18 Wall., 271.
Crest v. *Jack*, 3 Watt., 238-240.
Knouff v. *Thompson*, 4 Harris, 357–363.
Carr v. *Wallace*, 7 Watt., 401.

If a stranger builds on land knowing it to be the property of

another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

Ramsden v. *Dyson*. L. R., Vol. 1, Eng. and Iris. App. Cases, 129.
Bigelow on Estoppel, p. 670.

If a person about to act has knowledge, then there can be no estoppel *in pais*.

The Greensburgh Co. v. *Silener*, 40 Ind., 424.
Robins v. *Mayer*, 75 Ind., 389.

The party who has placed his title on record has given notice which every person is bound to know and respect. The law distinguishes between silence and encouragement. By words or acts one may mislead another into expenditures on his property, and this would be a positive fraud, while to remain silent would be innocent and lawful.

Knouff v. *Thompson*, 4 H., 364.
Alexander v. *Kerr*, 2 Rawle, 90.
Goudie v. *Northampton Co.*, 7 Barr, 233.

The facts sustain the proposition that "the doctrine of laches has no just application to our case." See depositions of Major Teel, page 135 of record, Gregoria Herrera, page 132, and page 56 to 59 of our argument. Also see page 127, Abandonment.

In the *U. S.* v. *Hughes*, 13 How., 3; *Fuentes* v. *U. S.*, 22 How., 443–461, and a few kindred cases, the question of *laches* was considered, but this was solely for the reason there was no attempt to perform the conditions, and no excuse given for not doing so; but we have found no case, upon an examination as thorough as opportunity would permit, to which *laches* have ever been applied to defeat a claim where abandonment was not proved to be voluntary and there was evidence of banishment. *Laches* must be founded upon equity, and equity promotes justice and hinders wrong. The defendants are not in position to invoke the salutary principles of equity. Their possession was obtained with constructive and actual knowledge of our title; not according to law, but in absolute violation of law, the Act of Congress of 1854 having provided "that all lands covered by Mexican claims should be reserved from sale or other disposal." Such possession and title being not only voidable but absolutely void, can not be protected by invoking the principles of *laches*. (See argument on sixth point, page 143.)

All cases to which the equitable rule has ever been applied, are unlike those which arise in the territory covered by the law of 1854. To apply the principles of *laches* to such cases and under such circumstances, would be lending the aid of a court of equity to perpetuate a wrong.

The case of *U. S.* v. *De Repentigney*, 5 Wall., 211–268, sus-

The proposition we argue, namely, that defendants having taken possession with actual and constructive knowledge of our rights, contrary to law are mere trespasses without color of right, and are therefore without any interest in the land to give them a stand in court to claim latches or to set up legal claim against plaintiffs whatever. They have been absolutely prohibited from this not only by the act of July 22, 1894, but also by the law of Congress organizing the territory of New Mexico, Part 1494-1497. This statute expressly provides: "No person shall in any case, hold or possess under title nor in any manner a portion of land within the limits of a Mexican grant." This was a law of Congress having full and exclusive jurisdiction of the subject matter. By virtue of these laws as well as others, defendants could obtain no interest in this land to give them a standing in court; therefore they are prohibited by these statutes from asserting any claim of latches against us—their title being against law void, and their possession equally so.

Winsor vs O'Connor, 69 Tex. 571-8 S. W.
Sherwood vs Fleming 25 Tex. 408 Sup.
Whitney vs Mac A Fee 1st Pa. 173- N. M
Therman vs Brick 93 U. S. 209.
Sutton vs Fasset 51st Cal. 13-15.

tains the point we argue. Here more than a century elapsed before the land was claimed—for thirty years there was no record filed, and the government of United States knew nothing of the grant; no steps were taken in fulfillment of the conditions, the claimant having left the country voluntarily, saying that he would not lose his Royal title for all lands in America, and yet this court refused to defeat the title on the ground of laches or abandonment, and put the case upon the ground that, as the United States succeeded to all the rights of this territory that existed in the King of France, and under the treaty of 1773 with Great Britain, had a right to sell the land, the same as the King had it continued under his dominion, and having lawfully sold the same, that was equivalent to office found. But how unlike this is our case, where by act of Congress of 1854 all lands covered by Mexican grants were reserved from sale and disposal. In the first case sale was lawful, in the second unlawful. Equity will invoke the principles of laches to protect the one, but not the other. All donations and sales of land covered by the Heath grant was contrary to the act of Congress of July 22, 1854, and for this reason all patents issued therefor were made so as "not to affect the adverse rights of any person whomsoever," or, in other words, they were issued subject to Heath's Mexican grant. And it is held: If title by patent is subject to a former right, the former right must prevail. In such case the patentee accepts the title of the United States with knowledge that another claim exists, and that he does not intend to deny or destroy it, nor to defend his title against it. *Bybee* v. *Virginia Ry. Co.*, 139 U. S., 674–8. See argument on 6th point, page 143.

It is said in *Lerma* v. *Stevenson*, 40 Fed., 356–9 (grant made by town council of El Paso, see p. 47 of argument), that grant was within the protection of the treaty and the Constitution of the U. S. could not be nullified as a *stale claim* without judicial inquiry.

Laches is an equitable defense, controlled by equitable considerations. He who makes the claim must have an equitable foundation of his own right, such as would make it inequitable to recognize the claim of the party asserting title against him. And that right cannot be founded upon an illegal or void deed or possession or upon a subsequent title subject to the right against which the principles of laches are sought to be invoked. In such case the claimant does not come with clean lands. Pomeroy's Eq. Juris., Sect. 816. Here no perfect legal title has been created in reliance upon the absolute termination of all interest in us or neither has any competent authority decided our title worthless. In no such case have even the principles of laches been applied. These and other facts distinguish our case from those where the equitable rule of laches is allowed.

Property of Catholics protected. Heirs of foreigners inherit land in Mexico unless denounced.

The act of 1823 protects the property in Mexico of all foreigners who are Catholics.

That Dr. Heath was a Catholic is clearly proven by the oral evidence, and the grant itself shows this. There could be no forfeiture of our grant by reason of the fact that Dr. Heath subsequently left Mexico or became a foreigner. This is prohibited by the express provisions of the law of January 4, 1823, under which the grant was made.

Art. 1. The Government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic Apostolic religion, the established religion of the empire." (page of brief.)

The learned gentlemen say:

" This fantastic proposition is based neither upon fact nor law. It is not correct that the provisions of Art. 1 are peculiar to the law of 1823."

but gives no reason to the contrary. They say the Spanish government required the profession of the Roman Catholic religion, and that no other religion was recognized. Who denied this? We did not, but so stated in certain parts of our brief. But we did assert and now repeat that the first section of the act of 1823 gave certain rights, privileges and protection to *property of foreigners who were Catholics not found in any other law in Mexico*, If article 1, as defendants claim, meant nothing more than that the government would protect the liberty, property and civil rights of foreigners who professed the Roman Catholic religion as long as they were domiciled in Mexico, why did they not so state and why does this provision differ so much from other laws? We must interpret a law just as we find it. The courts have no right to iterpret into a statute a qualification not found therein. The counsel's interpretation will suit the law of 1824, but it is not applicable to the statute of 1823. Both the meaning and language of this law of 1824 is just what the counsel would have you hold the acts of 1823 should be. Compare the statutes.

Art. 1 of Act of 1824.--"The Mexican Nation offers to *foreigners who come to establish themselves within its territory* security for their persons and property, provided they subject themselves to the laws of the country."

Sec.15.--Non-Residents.--"No person who by virtue of this law acquires a title to lands shall hold them if he is *domicilated out of the limits of the republic*."

Here is an express limitation to the protection of the property of foreigners, they must establish themselves in the country, and then no one can hold property if he is domicilated "*out of the limits of the republic.*" There is no such limitations found in the law of 1823. Here the rights of foreign Catholics to hold property is unlimited. Nothing is said about establishing themselves in the country or being domicilated out of the republic. It gives a special privilege to Catholics to hold real estate in Mexico. No such provision is found in any law prior or subsequent. Under other laws the Mexican nation offers protection only to foreigners who would come to the territory and subject themselves to the laws of the country,providing further that if they left, they would

lose their property. Therefore, by the early decisions it may have been held that under these statutes leaving the country or selling land to a foreigner was a forfeiture in itself, without judicial denouncement. But this rule cannot be applied to our case, as it was a part of the contract under which Dr. Heath took the grant that his property was to be protected while he was a foreigner as well as a citizen, he being a Catholic. For this reason our case is brought within the exception to the rule argued by defendant's counsel that a foreigner cannot transmit property by descent.

The exception is as well settled as the rule itself.

If the title to land is conferred on an alien by law, if by law as by statute or treaty he is enabled to acquire, by descent or purchase, and hold land as a citizen, he may maintain any actions in respect to it which a citizen may maintain. Thus by the constitution of the republic aliens were allowed to hold land by title eminating directly from the government. (Gen. Prov., Sec. 10.) So as the division of an empire works no forfeiture of a right of property previously acquired, aliens are entitled to hold the lands they had acquired by descent or purchase before the change in government. *Jones* v. *McMasters* 20, How., 8-20-21.) In these and other cases where the law recognizes an alien as a rightful owner of the estate, he may convey, lease, and do every other act in relation thereto, and can maintain any action and have the benfit of any remedy which the laws give to secure the enjoyment of the property to those the law recognizes as entitled to its enjoyment.

White v. Sabariego, 23 Tex., 243-246-7.
People v. Folsom, 5 Cal. 374-369.
Hanrick v. Patrick, 119 U. S., 156-169.
Airhart v. Massieu, 8 Otto, 491.
Phillips v. Moore, 100 U. S., 208.
Hardy v. DeLeon, 5 Tex., 239-240.
Jackson v. Beach, 1 Johns Cases, 399.
Merle v. Matthews, 26 Cal., 456.

And these authorities clearly hold that, no forfeiture by denouncement having been declared prior to the admission of Mexico into the United States, none for this reason can be enforced now.

The principle of *Yates* v. *Iams*, 10 Tex., when applied to the Statute of 1824, and the laws of Coahuila and Texas may be correct, for the reason that by the law itself the land was forfeited when owner was domicilated out of the Republic. But that was not the law of Spain and Mexico prior to 1824. Escriche says that if a foreigner dies out of Mexico his property shall not be confiscated, but shall be delivered to his heirs, though they may be foreigners, and that the right of escheate does not exist in Spain.

Settegast v. *Schrimpf*, 35 Tex.. 341.

But *Yates* v. *Iams*, and kindred cases have been modified by the more recent decisions of the courts of Texas and the Supreme Court of the United States. It is now clearly held that foreigners

may hold real estate, that upon their death their children take a defeasible title to the land, which title is valid both against individuals and the government until by some proper proceedings in the nature of office found, a forfeiture is declared.

Harrick v. *Patrick*, 119 U. S., 146–168.
Phillips v. *Moore*, 100 U. S., 208–210.

And especially is this rule true as to the property the title to which had once become vested in a Mexican citizen. There is a distinction between that class of cases where a party who had abandoned the country afterwards sought the government to perfect an inchoate or imperfect title, and cases where forfeiture of a perfect title on account of an abandonment of the country. The first class of cases are the Texas decisions quoted by the defendants, which hold that forfeiture occurs upon voluntary abandonment, but in the latter class it is settled that a forfeiture must have been pronounced according to due course of law.

Sabrego v. *White*, 30 Tex., 578.
Jones v. *Monts*, 15 Tex., 357.
Kilpatrick v. *Seneros*, 23 Tex., 113–129.
White v. *Burnly*, 20 How., 250.

Therefore, if by reason of Heath's Mexican citizenship, or by reason of his banishment from the country, his land became absolutely vested in him without condition, or if by the first section of the act of 1823 he, being a Catholic, and in a foreign country, was entitled to hold property, then in these events Heath or his heirs did not lose any of their rights to property in Mexico by reason of being in the United States. In such event they could have lived there enjoying same privileges as Mexican citizens, and could only have been deprived of their rights by proper proceedings of forfeiture.

Authorities cited above.

Heath became a Mexican citizen by obtaining the grant to his land.

Foreigners shall be deemed Mexican's when they acquire real estate in the Republic, providing always, they do not manifest their resolution to preserve their nationality.

Fed. Con. Art. 30 Sec. 11.
Hamilton's Mexican Laws Art. 11 p. 3–20.

Heath clearly manifested his intention to denounce his nationality and to become a Mexican citizen in both his petitions of April 1823 and December 1822.

To make our title good, it is not essential that Heath was a Mexican citizen, but the fact that he was such a citizen, becomes important in the proper solution of some of the points in our case. The learned Counsel fully appreciating this, earnestly argue that Heath never became a citizen of Mexico, that his heirs being dom-

icilated in the United States and citizen there could take no title to real estate in Mexico. They virtually concede that if Heath was a Mexican, then the negative of their proposition would be true.

That Heath being a Mexican citizen and being banished, remained so, is settled.

U. S. v. *Reading*, 18 How., 8.
Ennis v. *Smith*, 14 How., 424.
Abington v. *N. Bridgewater*, 23 Pick., 170–7.

The learned Counsel in court below argued that the land granted having come into the United States by the Gadsden purchase, Heath having died prior thereto, in the United States his heirs could not inherit.

The gentlemen are mistaken as to the facts of this case relative to the treaty of Guadalupe Hidalgo and the Gadsden purchase. All our land north and east of the Rio Grande River, about two-thirds thereof, came into the United States under the first treaty.

At the time of our grant the lower boundary of New Mexico was different from what it is at present—it came to the Rio Grande near El Paso del Norte, then followed up the river north to above where our land is situated. The line between Mexico and the United States, established by the Gaudalupe Hidalgo treaty, commenced where the Rio Grande empties into the Gulf of Mexico, followed the middle of said river to a point north of the Heath grant, then ran west, etc., thus putting into the United States all of Heath's land east of the Rio Grande River. The remainder came in under the Gadsden purchase in 1853.

As to the land coming into the United States under the Gaudalupe treaty, their able argument upon the proposition, "but even if the concession to Heath had conferred a title upon him the land granted would have escheated to the government at his death," is entirely eliminated from the case. Heath died after the treaty of Gaudalupe Hidalgo, therefore the question is not as to the right of his heirs to inherit lands in Mexico, but in the United States. For this and other reasons we have shown their pleas, argument and authorities have no applicability whatever to the case.

NO ABANDONMENT.

There was no abandonment of the country such as would work a forfeiture of our property, and cause it to immediately revert to the mass of the public domain. To have effect abandonment must be voluntary, not involuntary. Abandonment is not presumed from mere absence, it is a question of intent. There can be no abandonment without an intent to abandon. Absence alone raises no necessary presumption of abandonment, for it may be shown to be constructive presence. Absence from the land under duress

constitutes no abandonment and can work no forfeiture. The government of Mexico was alone itself responsible for the prolonged absence of Heath from his grant, and was estopped by its acts from declaring any forfeiture on account of such absence. To have declared a forfeiture would have been taking advantage of its own wrong. What Mexico could not rightfully have done in the premises, its successor in dominion, the United States, can not rightfully do. To withhold a confirmation of the land is in effect to confiscate the property by reason of a fault of the grantor. The government having interfered can not claim against the grantee either estoppel or forfeiture.

Henshaw v. *Bissell*, 85 U. S., 255–271.
Boggs v. *Merced Mining Co.*, 14 Cal., 368,
And page 118 of argument.

"No absence, if it be constrained or involuntary, or by banishment, threat of arrest or imprisonment, could work a change of domicile, abandonment or loss of property. The court rightly ruled that to constitute an abandonment of the country, the act must be voluntary. This principle was settled in the case of *Hardy* v. *DeLeon*, 5 Tex., 211. Such a doctrine as that a party shall forfeit his right and title and suffer disfranchisement in consequence of an involuntary act, done by coercion and compulsion of the constituted authorities of his country, would be too revolting to the common sense of justice of mankind to find a place in a just or enlightened code. There certainly is nothing in the laws of this country which can sanction or countenance such a principle."

Hardy v. *DeLeon*, 5 Tex., 211–235–245.
Affirmed in *Wheeler* v. *Moody*, 9 Tex., 372–5.
White v. *Burnley*, 20 How., 235-249.

No alienage caused by fine or by operation of law in a division of an empire will work a forfeiture of rights to property.

Airhart v. *Massieu*, 98 U. S., 481.
Sabriego v. *White*, 30 Tex., 576–584.
Kilpatrick v. *Sisneros*, 23 Tex., 113.
U. S. v. *Vaca*, 59 U. S., 556.

In order to constitute an abandonment of an important right, there must be a clear and unequivocal and decisive act of the party, showing a determination not to have the benefit intended.

Morse v. *Anderson*, 59 Tenn., 290.
Bank v. *Bank*, 77 N. C., 186.

The grantors abandonment of an acquired right is not to be presumed.

Green v. *Forbes*, 2 La. Annual R., 957.

"If one is expelled or driven out from a country, it is true he cannot be presumed to have abandoned all hope of return, whatever length of time may have passed since he was driven from it."

Enis v. *Smith*, 14 How., 424.

Madaline Barrera left Texas in 1836, went to Matamores, where she remained until her death in 1842. Held,

"Whether it was her intention to return to the possession of her property or not is not made manifest or disproved by any testimony in the case. The presumption would be in favor of her purpose of returning."

Sabriego v. *White*, 30 Tex., 584.

In the case of *Stark* v. *Mather*, 1 Walker, 181, 12 Am. Dec., 553, the Court, speaking of an abandonment, said:

"The evidence should be very conclusive to produce a satisfactory conviction that a man who had at great expense migrated with a large family to this fertile country settled and improved a valuable property in it, had voluntarily and without any reasonable cause moving him thereto, abandoned and forsaken both."

In 1844 a grant was issued to Sebastian Nunez for the Ranche Orestrimba, no juridical possession given or approval of Departmental Assembly had. Until 1850 the claimant neither occupied, cultivated or took possession of the land, no effort on his part to perform the conditions appears to have been made, and the only explanation of the delay to be found in the evidence, is contained in a single *sentence of the deposition* of Francisco Perez Pucheco to the effect that there was no *security in putting cattle on the Ranche for several years after the grant.*

"Held that a claimant of even an imperfect or inchoate title had upon showing a performance *cy pres or an effort to perform conditions subsequent which had been frustrated by unforeseen obstacles, an equitable right to a confirmation.* 2d.—Title could be divested only by proceedings by way of denouncement, under the former government, and if no denouncement had taken place, it was not deemed competent for the courts to inquire into and declare forfeitures, which might have occurred under the Mexican government. But assuming, as I am bound to do, that the grantee acquired a vested interest I have not felt authorized to say *that the circumstances show that he voluntarily abandoned, or surrendered his rights during the existence of the former government.* What circumstances the Supreme Court may hereafter regard as authorizing the presumption of abandonment we cannot now say but it has seemed to me that they should be *strong and unequivocal before we can declare that a right of property once vested in a grantee of the former government has been forfeited or lost by an abandonment.*

Sebastian Nunez v. *U. S. Hoffman, 191-3-4-6.*

In the case of *Antonio Maria Pico* v. *U. S.*, Hoffman, 142, it is held:

1st. A grant to an officer for meritorious service stands no better than any other grant under the colonization laws. 2d. The important and sole question is *whether anything done or omitted to be done by the grantee during the existence of the Mexican government, forfeits the interests he has acquired and revested it in the government.* Such forfeitures could only have been incurred by unreasonable delay or *want of effort on his part to fulfill the conditions and*

such as to raise the presumption that he had abandoned his claim. It being shown in this case that the delay arose from obstacles which may be regarded as insuperable, that it was not unreasonable but probably unavoidable, no presumption of abandonment can arise and the title not having been forfeited and revested in the government, remained at the time the sovereignty passed to the United States, vested in the grantee and the United States are bound in good faith to uphold and protect it. (17 How., 557.)"

New v. *U. S., Hoffman*, 162.

In a case of *Hardy* v. *DeLeon*, 5 Tex., 211-244, it was proven: that the infant plaintiffs, were children of DeLeon, who was a citizen of Texas on and before the Declaration of Independence. *In June of that year DeLeon and family were sent by the military authorities of the Republic of Louisiana;* that the mother of plaintiff died, the father taking the children to their grandmother in Mexico went back to Victoria, his former residence in Texas, to make arrangements to send for his children in Mexico. When in 1838, on his way to Mexico, he was killed. The court was asked to instruct the jury that DeLeon had abandoned the country and therefore lost his property; that plaintiffs could not recover, their father dying out of the country. Held:

"There was no evidence, which under any construction that the court might have given, could have warranted the jury in finding the fact of abandonment. To have held the removal of the ancestor of the plaintiff from his country and home *without his consent and against his will* to amount to evidence of the abandonment by him of his country would have been to sanction an utter perversion of facts and a total disregard of the truth and justice of the case. *To constitute the abandonment of one's country, there must be the concurrence of the act and will.* The ground on which it is proposed to *disfranchise the party and to divest his title to his property ought to be clearly and conclusively established.*"

In *Glenn* v. *The U. S.*, 13 Howard, 259, it is held that a threat of fine and imprisonment is a prohibition sufficient to excuse settlement and cultivation of land.

Hinderkoper v. *Douglass*, 4 Dallas, 391.
Commonwealth v. *Coxe*, 4 Dallas, 170.

The case of *White* v. *Burnley*, 20 How., 235, was a controversy over a Mexican land grant in Texas. It was claimed that the title was *ipso facto* forfeited by voluntary abandonment. It is direct in point.

Soon after the grant was issued Manso, the grantee, left Texas and went to Louisiana, where he resided from the fall of 1834 up to the time when he conveyed his land in April, 1836. He took no part in the revolutionary movement, but quietly left the country. *Manso was a Spaniard and he left because all Spaniards were ordered to leave the country.* It was insisted that his removal was an abandonment of the country and a forfeiture of his

land according to colonization laws Coahuila and Texas, and the court was asked to so instruct the jury, which request was refused, the court saying:

"If the jury, believing from the evidence, that Manso was forced to leave the country by the public authorities, on account of his being a Gauchapin and his doing so was not voluntary, it was no abandonment of the country within the meaning of the colonization laws, and did not divest his right to his land.

That the burden of proof is on the defendant, to show a final and complete abandonment of Mexico, prior to the second of March, 1836, on the part of Manso, in order that an *ipso facto* forfeiture of his land under the colonization laws should be made out, and the facts on which it is sought to disfranchise a party, and to divest his title to property ought to be clearly and conclusively established."

Upon appeal, Supreme Court said:

"The evidence did not warrant any charge from the Court on the ground of abandonment of the country by Manso. The case of *Hardy* v. *DeLeon* (5 Texas R.) is conclusive on this ground of defense. To hold otherwise, would violate the entire doctrine laid down in the case of *McMullen* v. *Hodge*, (5 Texas R.) There must be *some* evidence on which a charge to the jury is founded, otherwise it cannot be lawfully given. As there was no evidence from which an abandonment could be found by the jury, an instruction on the subject could only mislead. (*Chirac et al.* v. *Reinecka*, 2 Pet., 249.")

White v. *Burnly*, 20 How., page 249.

Applying this law to our facts, the abandonment alleged by the defendants, is explained, excused and justified and by competent and legal testimony it is shown that Heath was against his will wrongfully driven out of Mexico, that his title is legal and valid, and should therefore be confirmed.

NO FORFEITURE OCCURRED OR WAS EVER DECLARED.

There can be no claim of forfeiture upon conditions precedent in our case. What was required of Dr. Heath was to be done after possession was given. It was therefore a condition subsequent. There is no condition whatever to be found in our title papers. But in section 23 of the act of 1823, it is provided that if the colonist does not within two years from date of concession cultivate his land, the rights of property shall be considered as renounced, etc. The colonist then took a title in fee upon conditions.

"The fee vested at once, subject to divesture should there be a failure to perform the acts and to comply with the conditions specified; and this was a condition subsequent, not a condition precedent. It is well settled that if the act required does not necessarily provide the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the par-

ties that the estate shall vest and the grantee perform the act after taking possession then the condition is subsequent."

Clinton v. *Washburn*, 46 N. W. R., 555, 556.
2 Wash. Real Property, 7, and authorities cited.
4 Kent, 125.
Wheeler v. *City of Chicago*, 68 Fed., 528.

In Arrendondo's case, 6 Peters, 691, the grant was upon similar conditions of cultivation, establishment, etc., and on p. 745 the court says:

"We now consider the conditions upon which the grant was made. According to the rules and laws by which we are directed to try this case, there can be no doubt that they are subsequent. The grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions, which were that the grantees should establish on the land two hundred Spanish families, together with the requisites pointed out, and which shall be pointed by the superintendency, and begin the establishment within three years from the date of the grant."

In the case of *Fremont* v. *The U. S.*, 17 How., 541, one of the conditions was: "he shall build a house within one year, and it shall be inhabited." The court said:

"It has conditions attached to it, but these are conditions subsequent. Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates, and the rigorous execution of them is a *summum jus*, and in many cases hardly reconcilable with conscience. A court of equity will never lend its aid to divest an estate for breach of a condition subsequent."

Kent's v. *Commentaries*, 130.
Clinton v. *Washburn*, 46 N. M., 555, 6.
Curtis v. *Board of Co. Comm.*, 23 Pac., 98.

And it has been suggested by the Supreme Court of the United States that doubt existed whether a court was authorized to give effect to a condition of forfeiture, when the land had been legally granted.

McMicken v. *U. S.*, 97 U. S., 216.
U. S. v. *Sibbold*, 10 Peters, 313.

Under the laws of Mexico such conditions were waived:

"After proprietorship conditions were exempted."

White's Recop. White v. *Holliday*, 11 Tex., 615.

Sec. 2481, page 634, Hall's Mexican Law.—Contracts legally made shall be punctually fulfilled, and they cannot be revoked, nor altered, except by the mutual consent of the contracting parties, save the exceptions in law.

Sec. 2868, page 681.—A donation is irrevocable from the time the donee accepts it, and the acceptance is made known to the donor.

Sec. 1138, page 326, Hall's Mexican Law, provides that denouncement shall be made before the departmental government (gobernacio) directly or through the medium of the respective employes in each state, and the denouncer was to receive one-quarter of the land.

"The executive shall cause the contracts that are not carried into effect in the time stipulated to be published, that the respective lands may be understood to have become vacant and open to colonization."

Art. 11, Decree 128, of Coahuila-Texas.
Early Laws of Texas, p. 79, Sec. 11.

This law of 1823 in itself provided how and when lands could be forfeited. We submit that we could be deprived of our title in no other way. When a statute declares a penalty or a remedy, the punishment or the remedy can be only that which the statute prescribes.

Farmers Nat. Bank v. *Dearing*, 91 U. S., 29.
Stafford v. *Ingersoll*, 3 Hill, 29-35.
First Nat. Bank v. *Lamb*, 57 Barb., 499.
Gonzales v. *Ross*, 120 U. S., 605-625.

The divesture of title by government can only be accomplished in the mode authorized by law.

Doswell v. *DeLa Lanza*, 20 How., 34.
Cook v. *Fisher*, 75 Fed., 771.

Art. 23 provided that if our land was not cultivated within two years, "in which case the ayuntamiento might grant to another," while Art. 11 provided that in order to "prevent accumulation of lands in large portions, lands *not cultivated* were to be divided up and sold, *indemnifying the proprietors for the just price of such lands, to be fixed by appraisers.*"

We submit:

1st. The facts to make a forfeiture did not exist.

2nd. No authority ever found there was a forfeiture.

3rd. A re-grant by the governor and not by the ayuntamiento without a hearing or judgment can not be held to be a forfeiture.

4th. Heath's possession and ownership could not be destroyed for want of cultivation without some legal proceedings of divesture and compensation.

Our case comes within the ruling of the Supreme Court of the U. S. in case of *Brownville* v. *Cavazos*, 100 U. S., 138, where it is held the constitution of Tamaulipis having provided that land could not be expropriated or divested without previous compensation fixed by appraisers appointed by the state and the party in interest, that property could be forfeited only on appointment of appraisers and payment of compensation.

There is a rule of Spanish and Mexican law that no one can be deprived of his property without previous inquiry as to the existence of a fact which may, when properly ascertained, deprive him of his right.

White's Recop., 942 *Id.*, 85.
Hancock v. *McKinney*, 7 Tex., 384–435.

That the ascertainment of the facts necessary to make a forfeiture must be made, is clearly sustained by the act of 1823 and

the authorities. Sec. 23, after stating what is to work a forfeiture, says: "In which case the respective ayuntamientos can grant it to another;" contemplates the necessity of first ascertaining if there was such a "case," namely: failure to cultivate within two years. This fact must have been ascertained by some competent authority before any legal forfeiture could be declared.

"*The issue of a subsequent grant, even after the usual reference and report that the land was vacant, did not have the effect of a denouncement. There must also be an adjudication on the previous grant.*"

Jones v. *Garza*, 11 Tex., 185.
Sabariego v. *Maverick*, 124 U. S., 261-291.

The ayuntamiento was the proper authority to recall titles where the conditions had not been performed. (*Hollman* v. *Peebles*, 1 Tex., 707; Col. Law of 1825, Art. 25.) And in cases of abandonment of the country as being similar. (Rule 26, 2 Partidas, 1,248; 1 Febrero Mex., 73, 74, Av. 2.

"The respective political authority to whom was entrusted the power, upon abandonment of the country or non-performance of other conditions, to declare the forfeiture of the lands, did declare the forfeiture and nullity of the grant to McCormick, under which the defendant claims, and the land was regranted as being entirely vacant. The title was thus virtually recalled and canceled or annulled, and was henceforth to be regarded as though it never had an existence. (*Holliman* v. *Peebles*, 1 Tex., 691.) And this was by the judgment of a tribunal whose proceedings were made a matter of record and of public notoriety at the time, and have become a part of the history of the land titles of this country under the law of colonization."

Marsh v. *Weir*, 21 Tex., 111.

"There is no doubt that in practice under the Spanish law, when grants of land were made upon conditions, if the conditions were not performed, any one might denounce them, prove the forfeiture and apply and have the land granted to himself. But then it developed upon the party denouncing to prove the forfeiture. (2 White, p. 218, Sec. 9.) And if it be conceded that the plaintiff had the right to institute this proceeding, in analogy to the practice under the Spanish law for the purpose of having this forfeiture adjudged for the reason of non-performance of conditions, *nothing can be more perfectly clear than that it devolved on him to prove the facts in which the forfeiture consisted. A contrary doctrine would be repugnant to the plainest principles of justice and common right. We can not consent to the idea that any man who may have an unlocated land certificate may by locating it upon land in which the title is in another, and alleging that the other has forfeited his right by non-performance of conditions subsequent, or in any other manner, compel the owner to come forward and prove the negative, that he has not so forfeited his right.* (7 Tex., 384.) *Titles issued to colonists were of entirely different character from those concessions issued by the Spanish authorities in Florida, and afterwards pronounced inchoate by the Supreme Court of the United States. Under these laws the title of possession was a final title.*"

Hancock v. *McKinney*, 7 Tex., 384.

"Titles are valid until the state by some proper proceedings in the matter of office found has declared a forfeiture."

Hanrick v. *Patrick*, 119 U. S., 169.

This is the rule whenever the laws and statutes of Mexico are to be construed.

"By civil law as well as by the common law, the king cannot take upon himself the possession of an estate said to have escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office, and in this there is a difference from a forfeiture for want of the performance of conditions precedent, for in the latter the conditions never having been performed, the title has not vested. An alien may hold real estate against every one, and even againt the government until office found. 3 Black., 259; 13 Wend., 566; 3 Wheat., 553; Escriche, Partidos Hispano Mexicanos, Vol. 11, 696; Sala Mexicano, Vol. 11, 240; *Ramirez* v. *Kent*, 2 Cal., 559. So that on the death of L., his mother, by natural justice, became entitled to the possession and could not be disturbed until office found. No such judicial proceedings was instituted and no act of the Mexican government was done to divest her defeasible estate. While things remained in this condition, the treaty was ratified and California became a territory of the United States. With a change of flags there was a change of political laws; the United States after the treaty became vested with no authority to prosecute any claim for a forfeiture that had occurred in California to the Mexican government."

The People v. *Folsom*, 5 Cal., 379.
Minturn v. *Brower*, 24 Cal. 644–664.
De Merle v. *Mathews.*, 26 Cal., 456–478.
Escriche, title Denuncia.

It will not be denied that under the foregoing decisions an alien may purchase and hold real estate, and to say he might do this and still be disqualified from taking by inheritance, would involve a legal solecism. (5 Cal. 381.)

Speaking of titles under the law of 1824, the court said:

"Under Mexico it might have been submitted to the territorial assembly, reported against, *forwarded to the supreme government, and been there rejected; or in case the conditions of the regulations, as to cultivation or occupation of the land, had not been complied with, it might have been denounced, and upon proper investigation the estate declared forfeited. But until one or the other of these provisions had taken place, the title continued in Sutter unimpaired. Neither of these proceedings were had under the Mexican government, and therefore at the date of the cession of California to the United States this title remained in full force.*"

Ferris v. *Coover*, 10 Cal., 619.

A title can not be destroyed by a simple *ipse dixit* of the constitution, any more than by a legislative act. Some proof at least must be given in a judicial proceeding to show that a title was forfeited, if that be a fact, before it can be declared null and void.

Gonzales v. *Ross*, 120 U. S., 629.

"The grant being valid is within the protection of the treaty of Guadulupe Hidalgo and the constitution of the United States; and it is not competent for the state to nullify it, as a stale claim, without judicial inquiry or to prohibit its use as evidence."

Lerma v. *Stevenson*, 40 Fed., 356-9, and many authorities cited.

This, by the way, was said of a grant made under the law of 1823 by the same town council that executed our grant. See page 47 of this argument.

The principle which we argue is the universal doctrine settled by all the courts, wherever the questions have arisen. The Supreme Court of Mississippi in two cases very ably and learnedly discuss the principle for which we contend. The opinions are so direct in point, we will quote at length:

"The report of the Surveyor of the Spanish government stating *the land to be vacant* and the allegation of that fact in a Spanish grant *does not amount to a confiscation or a revocation of a prior grant of the same land.*

"A revocation of a grant, by the effort of capricious tyranny, ought to be disregarded. The Spanish order of survey confirmed by the United States constitute a legal title, independent of a patent. Congress cannot impair the vested rights of individuals, much less could their subordinate officers impair those rights."

Winn v. *Cole's Heirs*, 1 Walker, 119.

In 1791 Robert Stark, plaintiff's ancestor, obtained from the governor-general of the province of Louisiana an order of survey for 2,000 acres: the land was surveyed and returned by W. Dunbar, deputy surveyor. Plaintiff's petition alleged that his ancestor was put into possession and remained so for several years, complying with all the conditions of concession, by paying the fees, cultivating several crops, etc., that his said ancestor, not being satisfied with his situation proposed to Governor Gayozo to relinquish said tract of land on express condition that he should receive in exchange another one of equal value which he might select. That said Governor, without complying with said conditions, from a personal dislike to their said ancestor, in 1794 deeded said tract of land to one James Mather, the defendant's ancestor, who took possession of the same, together with a crop of corn, etc., against the will of plaintiff's predecessor in title. That Mather's title was obtained through the fraudulent representations of W. Dunbar and other officers of the Spanish government. The defendant's answer admitted an order of survey and possession of plaintiff's ancestor, denied extensive improvements, etc., alleging that he heard that R. Stark had vacated said land and that he, Mather, had rightfully obtained a title to the same. Further alleging that R. Stark never made any application for other lands, but abandoned the same, leaving the country, not returning until after a change of government. That said land had been in continued possession of defendant for over twenty years, etc. The question of abandonment was found in favor of the plaintiff. The Supreme Court, approving the finding of the jury, said:

"The evidence should be very conclusive to produce a satisfactory conviction that a man who had at great expense emigrated with a large family to this fertile country and settled and improved a valuable land property in it had voluntarily and without any reasonable cause moving him thereto, abandoned and forsaken both."

The court further held: *If the government by mere act of power revokes a grant and gives title to another the courts will respect the title of the first grantee.*

When A received a grant of land from the Spanish government which was revoked by an arbitrary act of power, and the land granted to B, and A driven from the country, and B's title is confirmed by the Board of Commissioners, B shall be decreed to hold as trustee for A.

In the case of *George Winn* v. *Cole's Heirs*, decided at the adjourned January term, 1823, this court held:

"That the possessory order in favor of James Cole to the premises in question, dated sixth of June, 1795, by which said Cole was put into possession, vested in him such a right as could only be defeated by his own act of alienation, voluntary abandonment, or by such an entire failure of the conditions of the grant, or by some act against the government, which could justify in them its confiscation."

In regard to the first, there is not in this case, as there was not in that case, any pretence set up. In that case, it was not pretended that there was, and in this the jury have expressly found that there was not a voluntary abandonment, and in neither case is it alleged that there were any rebellious or treasonable practices on the part of the grantees to justify the Spanish government in the revocation or confiscation of its grant or order of possession.

In the absence of a record of a judicial or or official revocation or confiscation of the grant to R. Stark, the ancestor of complainants, for good causes moving the government thereto such as before stated, viz., failure to fulfill the conditions of the grant, or some act of treasonable or rebellious practices against the government, in case where it is not pretended there was an alienation of right, and the jury has expressly found that there was not a voluntary abandonment of it, the re-granting of the subject-matter of such right to another person, shall be deemed the result of mistake, or of the second grantee had due notice of the prior claim, the procurement of false representations and fraudulent practices on his part, or the effect of lawless power in the governor, unsupported by reason or justice, and not to be upheld by a decree of that tribunal, which hath no help for fraud or oppression; whatever, therefore, may have produced another grant of the same premises, before the first grantee had been legally divested, such a subsequent grant can convey no right or property in the premises to the prejudice of the subsisting rights of the first grantee, and he who occupies the controverted premises by virtue of such a subsequent grant, though he be ushered in under the panoply of a

full and complete legal title, and be supported in his possession by the strong arm of power, shall nevertheless, after that domination ceases, be decreed by courts exempted from its influence, to hold and possess as trustee for him so unjustly evicted. If the possession of James Mather was, as it certainly was in our estimation, virtually the possession of Robert Stark, the ancestor, then the absence of the latter, on the twenty-seventh day of October, 1795, shall not defeat his claim, we are inclined to think that such would be our opinion even in a case where the contest had been wholly between two citizens, where the weaker with the better right was overborne by the stronger, and under such discouragements, voluntarily left the country, *but surely in a case where a man flies from the strong arm of power, he shall not forfeit any right thereby.*

Stark v. *Mather*, 1 Walker, 181; 12 Am. Dec., 553.

We submit that there was no forfeiture of our title by reason of subsequent re-grants of a portion of it by the Mexican government. Under the Mexican laws and statutes, re-grant is not the evidence of forfeiture; there must have been a judgment of a proper court as to the grounds of forfeiture. See authorities above.

We have not found a single case that conflicts with the long line of authorities we have given, or denies the proposition that a Mexican grant when once vested, could be forfeited without judicial inquiry. There are a few cases which hold that a re-grant of the government is equivalent to office found, but the inquiry is left to the judiciary, as to whether the forfeiture has been legally made.

Farnsworth v. *M. & P. R. Co.*, 92 U. S., 49.
Schulenberg v. *Harriman*, 21 Wall., 44.
McMecken v. *U. S.*, 97 U. S., 204–217.

We have no controversy with these decisions. They do not tend to deny the argument we have made, or to overrule the cases we rely upon. Under the rule they announce, the validity of our grant is still open to judicial inquiry, that while the office found might not be necessary, yet it was the safest, best and only way to avoid uncertainty in titles and consequent litigation. That as forfeiture must be declared by office found or by some equivalent way, re-entry and re-sale for breach of the conditions, if attempted by a mode other than by judicial proceedings, the title is left open to legal contestation. Re-grants can not effect our rights. If the land belonged to us, these grants were void, and there being no estoppel the whole matter is open for controversy, but not so if there had been office found.

Farnsworth v. *M. & P. R. Co.*, 92 U. S., 66–7.

In the case of *At. & P. R. Co.* v. *Mingus*, 17 Sup. Ct. R., 353, the court said:

"But while we think the practice of forfeiture by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that the power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government nor with the constitutional rights of the grantee, to hold that the government, by an arbitrary act, might divest the latter of his title when there had been no breach of the conditions, subsequent *or when the government itself had been manifestly in default in the performauce of its stipulations. The inquiry in each case is a judicial one—whether there has been upon either side a failure to perform; and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture.*"

This doctrine that a regrant was a forfeiture has never been applied to grants made under Mexican laws.

In *Hornsby* v. *U. S.*, 77 U. S., 240, Justice Field said:

"But independent of the considerations stated, it is a sufficient answer to the objections to say, *that a mere neglect to comply with the conditions did not of itself work a forfeiture of the grantee's rights under the Mexican laws. The neglect of a grantee to apply for or take possession, if unreasonably prolonged, only left the land open to denouncement by other parties. The interest of a grantee could not be divested under the Mexican law, any more than at the common law, upon mere allegations or surmises. Some formal and regular proceedings were required to effect such divesture, and under the Mexican law they had their inception in what is termed a denouncement by a party desirous of obtaining the land. An investigation then followed, whether or not the conditions had been complied with or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree, the title did not revert to the government, nor was the land subject to be re-granted. There having been no forfeiture of the grantee's interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation.*"

Affirmed in *Henshaw* v. *Bissell*, 85 U. S., 262-3, the court saying:

"The estate granted was not afterwards liable to be divested except by regular proceedings of denouncement. The power of the governor over it had ceased. He could neither revoke the grant nor impair the interest of the grantee by any attempted transfer to others."

This Hornsby case is very direct in point. That our grant was a fee simple title *in presenti*, was definitely fixed, located and determined, and therefore not a float, and that such a title could not be annulled under Mexican laws except by proper proceedings of forfeiture—these and other questions involved in our case are all here clearly settled.

Therefore, we say, there having been no forfeiture of the grantee's interest in our case, nor any such disregarded of the conditions annexed to the grant as to have justified a forfeiture, under the circumstances and facts presented, the law having been repealed and the grantor having excused, waived, hindered, and prevented the performance of conditions subsequent, the claimants under the grant are entitled to a confirmation.

SIXTH POINT.

The equities of this case are all with the plaintiffs. Their predecessor in title having fulfilled his part of the contract by expending money and trying to occupy and cultivate the land granted, but having been prevented in this by the revolution which overthrew Iturbide, the Emperor, his title became absolute and unconditional and was not affected by the establishment of any new and dependent form of government, or by any subsequent grants of this land, they having been made without jurisdiction. The defendants, who occupy a portion of our land, are not innocent holders, they having previous knowledge of our title, recorded grant and public survey.

We submit that the pretended right set up by the defendants who claim a portion of the land covered by our grant is void in law and equity. Our grant being first in time is first in right, and it must be held that they took subject to us, and that the land having been granted to Heath in 1823, there was no title subsequently in the governments of Mexico and the United States to grant to the defendants.

While it might be true this court under an act of March 3, 1891, may not have jurisdiction to determine and settle absolutely the controversy between plaintiffs and defendants, the parties who are claiming a portion of our grant, as to who has the older and better right or title, yet defendants having been permitted to come in and defend, by trying to defeat our grant, the same principles, points and contentions arise before the court as would arise in another court after the confirmation of our grant. If our title is valid in law or equity, perfect or imperfect, choate or inchoate, then the fact that the defendants pretend to hold a part of this land under a subsequent grant should not be considered in helping to defeat our title. If our grant is good and valid, then the defendants have no title, so virtually the same questions arise as if the plaintiffs and defendants were claiming under separate patents. The answer of the defendants is, that a portion of the land belongs to them and not to the plaintiffs.

"In an action of ejectment, when both parties claim the premises in controversy under patents of the United States issued before a confirmation of grants of land in California made by a former Mexican government, both of which patents cover the premises, the inquiry of the court must extend to

the character of the original grants, and the controversy can only be settled by determining which of these two gave the better rights to the premises."

Henshaw vs. *Bissell*, 18 Wall., 255.
Cameron v. *U. S.*, 301.

The case of *Harrison* v *Ulrich*, 39 Fed., 656, is very interesting and instructive on many of the points in our case.

Patents had been issued to both claimants by the government of the United States. Both claimed by old concessions and possessions at certain times, but neither had any title papers or record until May 22, 1834. Governor Figueroa made a final grant to Catarina Ruis, and other heirs of Manuel Nieto, the plaintiff's predecessor. The defendants claimed through a petition, dated Sept. 11, 1801, to Aurrillagas, governor of the territory, and possession; but this application was never acted definitely upon. Subsequently the board of commissioners treated the concession as a grant, or at least as an equitable right to it, and confirmed the claim July 10, 1855; a patent was issued by the United States December 31, 1883. Patent to plaintiff was issued August 27, 1877, subsequent to confirmation of plaintiff's title by board of commissioners. Both having patents, the question was which had the older and better right. Held:

1st. That although the grant to Catarina Ruis was not approved by the departmental assembly, but did invest her with full ownership and title to the fee in the land measured off in the proceedings given her official possession, her title could not be affected by any subsequent patent to another.

2d. That if the concession to Manuel Rodrigues, whom the defendant represented, had passed the title to him in 1801, then the governor would have had no power to grant the title to the heirs of Nieto; and to subject the grant to the possible forfeiture for breach of conditions annexed.

3d. That the plaintiff's title being the older and better one —the first made by the Mexican government, their rights should be sustained and respected.

Lands conveyed by a Mexican grant are not public lands, but are reserved from other grants and patents.

The title to a Spanish or a Mexican claim is such that the right of private property cannot be impaired by a change of sovereignty. These lands are not included in the public lands, " and until such claims are finally decided to be invalid, they are not restored to the body of public lands to be granted. *This exclusion does not depend upon the validity of the claim or its final establishment, but upon the fact that there exists a claim of right under the Mexican government which was yet undetermined.*"

Newhall v. *Sanger*, 92 U. S., 761.
Wright v. *Roseberry*, 121 U. S., 488–519, 520.
Doolan v. *Carr*, 125 U. S., 618.
U. S. v. *McLaughlin*, 127 U. S., 428.
Leavenworth L. & G. R. Co. v. *U. S.*, 92 U. S., 733.

Kansas R. R. Co. v. *Dunmeyer*, 113 U. S., 629.
Bardon v. *N. P. R. Co.*, 145 U. S., 535-543-5.
Knight v. *U. S. L. Ass.*, 142 U. S., 161-176.
Shanklin v. *McNamara*, 26 Pacf., 345.

Not only by virtue of the laws of Mexico, the treaty and decisions quoted, must our title be confirmed, but by reason of the Act of Congress of July 22d, 1854, our grant was protected, held *sub judices*, until action by surveyor-general and Congress; because the 8th section of said Act expressly declares: that "until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

An Act to establish the office of surveyor-general of New Mexico, July 22d, 1854, Land Laws of the United States, 1882, p. 942,—10 St. L., 308, Sec. 8:

"That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all necessary acts in the premises. He shall make a full report on all such claims as originated before the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with the decision as to the validity or invalidity of each of the same, under laws, usages and customs of the country before its cession to the United States, and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior, which report shall be laid before Congress for such action thereon as may be just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848 between the United States and Mexico; and until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

In *Cameron* v. *U. S.*, 148 U. S., 309, it is held that when land has once been legally appropriated for any purpose it became from that moment severed from the mass of public lands, and not within the meaning of that term as used in the acts of Congress respecting the disposition of public lands. The court also held:

"And in *Newhall* v. *Sanger*, 92 U. S., 761, lands within the boundaries of an alleged Mexican or Spanish grant, which were *sub judice* at the time the Secretary of the Interior ordered a withdrawal of the lands along the road of a certain railroad, were held not to be embraced in a grant to the company. Speaking of such claims, it was said by Mr. Justice Davis, 'that claims, whether grounded upon an inchoate or a perfected title, were to be ascer-

tained and adequately protected. This duty enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim, until it was barred by lapse of time or rejected.' It was urged in that case that the reservation could only be of lands 'lawfully' claimed, but it was said expressly that there was no authority to import the word 'lawful' into the statute in order to change its meaning, and that the act in question expressly excluded from pre-emption and sale all lands covered by any foreign grant or title."

A patent or grant approved subject to the claim of others who may have an interest in it, is only a quit claim releasing such interest as the United States possesses in the land conveyed by the original grant. It conveys nothing which the government at the time had not the power to grant, and whether or not said land was previously granted is open to investigation upon collateral attack.

White v. *Cannon*, 6 Wall., 443.
Teschemacher v. *Thompson*, 18 Cal., 11.
Smelting Co. v. *Kent*, 104 U. S., 641.
Wright v. *Roseberry*, 121 U. S., 519.
Miller v. *Dale*, 92 U. S., 473.

A *bona fide* purchaser under a quit claim deed assumes the risk of title and takes only what his vendor can lawfully convey and is not regarded as a purchaser without notice, entitled to the benefits of the registration, even though he had no actual notice.

Webb, Sect. 163.
Thorn v. *Newsom*, 64 Texas, 161.
Butler v. *Barkley*, 25 N. W. R., 747.

If title by patent is subject to a former right, the former right must prevail. In such case the patentee accepts the title of the United States with knowledge that another claim exists and that he does not intend to deny or destroy it, nor to defend his title against it.

Dredge v. *Forsythe*, 2 Black, 568.
Mehan v. *Forsythe*, 24 How., 175.
Byran v. *Forsythe*, 19 How., 334.

Our rights could not be and have not been effected by the confirmation or patents issued for any part of the land covered by our grant. It was not the intention of the government of the United States to do so. The confirmation of the claims of Juan Antonio Garcia and Hugh Stevenson as well as the patents to all other defendants contains these words: "That the confirmation and patents shall only be construed as quit claims or relinquish-

ments on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever."

Land Laws of U. S., 1882, p. 944–5.

Here our rights are expressly reserved, "and it is to be presumed that Congress thus acting, had examined into the facts of the case and were fully advised that there was a conflicting claim set up to this land by third persons, and inserted this proviso for the express purpose of preventing the courts from giving this confirmation act such a construction, as should in any manner, affect the rights of third persons, whatever they might be."

Hamilton v. *Avery*, 20 Tex., 612–632-3.
Howard v. *Perry*, 7 Tex., 262.
Hart v. *Gibbons*, 14 Tex., 215.

An important question arises—it is as to the effect upon our right under Sect. 14 of the Act of 1891. It is therein provided "that if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person *shall remain valid, etc.*"

We are informed that in several cases decrees of United States Land Court have been entered, deducting lands granted to others, giving claimant of Mexican grant $1.25 per acre for the land taken, payable by the United States, as provided in the Act of 1891. The question has not yet been decided by this court.

We are further informed that two members of that Honorable Court have dissented from this ruling, upon the ground that this part of the act is unconstitutional, for the reason it is taking property without "due process of law." That while the majority of the court do not deny this proposition, yet hold that the act of March 3, 1891, is a limitation upon the powers of the court to act, and that all the authority they can exercise, must be within the prescribed limits of the act itself. We insist that this rule has no applicability to our case, for the reason there has been no sale or transfer of any portion of the Heath grant, that could possibly effect our rights. We have shown that it was expressly provided that the confirmation of that portion of this land transferred, should only be construed as a quit-claim or relinquishment on the part of the United States, and *should not effect the rights of any other persons whomsoever.* Such was the title taken by the parties to whom conveyances were made. The act of 1891 does not pretend to enlarge their rights. Its language is, "such title from the United States to such other person *shall remain valid,*" not be made valid, but remain as it was. We have shown that this title was subject to ours if we have a valid one, that the receiver of the same could not deny or destroy our title, and in the language of the Supreme Court of Texas, in a similar case, this proviso was inserted by Congress in the confirmation for the express purpose of

preventing the courts from giving this confirmatory act such a construction as should in any manner affect our rights, or the rights of any person whomsoever.

Hamilton v. *Avery*, 20 Tex., 612–632–3.

That the effect of such a deed or patent is just what we have claimed, is clearly supported by the authorities quoted. We fail to find anything in the law of 1891, that requires this court, to violate the inalienable rights of property secured to us by the constitution of the United States, the treaty of Guadalupe Hidalgo, as well as the 22d section of the law of 1823 which provided that "our concession constituted an inviolable law for the right of property and legal ownership." With our interpretation, these and the law of 1891 can stand together. To destroy these sacred rights and guarantees, the mandate should be very strong.

That the taking of any part of our grant at the arbitrary price of $1.25 per acre would be depriving us of our property without due process of law, and therefore unconstitutional and void, scarcely needs any citation of authorities.

3 Am. & Eng. Ency. of Law, 714–758.
Weynehamer v. *People*, 13 N. Y., 327–8.
Texas Mex. Ry. Co. v. *Locke*, 12 S. W. R., 80.
Pumpelly v. *Green Bay Co.*, 13 Wall., 179.
Norman v. *Heist*, 5 Watts & Sergent, 193.
Cooley's Constitutional L., Sect. 351–7–8–393.
Gardner v. *Newburgh*, 2 Johns Ch., 162 and note.
Osborne v. *Hart*, 24 Wis., 91; 1 Am. R., 161.

The taking of our property contrary to our constitutional rights and vesting it in another, by virtue of the provisions, "such title to such other persons shall remain valid," is certainly a strained construction of these words as well as an open violation of the provision that said "transfer to such other persons should not affect our rights."

The point we argue has been settled by high authority. First—Under the act of July 22, 1854 (see page 193), the surveyor-general was to ascertain the origin, nature, character and extent of all Spanish and Mexican land claims and report same to Congress for final action; and until final action of Congress thereon, all lands covered thereby should be reserved from sale by the government. Therefore, all lands covered by Mexican grants being excepted from general sales, all attempted sales or patents issued on same are not only voidable but *absolutely void*, having been made contrary to law. It has been so held in a number of cases, under the Florida treaty in Missouri, Arkansas and Louisiana.

Stoddard v. *Chambers*, 2 How., 284–313–5–6–7.
Easton v. *Salisbury*, 21 How., 426–431–2.
Menard's Heirs v. *Massey*, 8 How., 293–307–8.
Bissell v. *Penrose*, 8 How., 317–331–8–9.

Mackey v. *Easton*, 19 Wall., 619–626–7–8–9–632–3.
Barry v. *Gamble*, 3 How., 31–53.
Carondelet v. *St. Louis*, 1 Black., 179–189.
Hot Springs cases, 92 U. S., 698.
U. S. v. *Carpenter*, 111 U. S., 347.
Kans. Pacf. Ry. Co. v. *Dunmeyer*, 113 U. S., 629–642–4.
Newhall v. *Sanger*, 92 U. S., 761.

SECOND—In accordance with this statute these attempted sales or confirmation of subsequent Mexican grants, were made subject to our claim by express words providing that,

"Confirmation should not effect the adverse rights of any other person whomsoever. As to us these sales are void and can be of no effect. The law of March 3, 1891, does not attempt to make valid a void sale—it only provides that a sale which is valid '*shall remain valid*'—not be made valid. It is evident sale here means a valid legal sale, and not a quit claim or relinquishment made as in our case reserving our rights by express statute. As to us the sale was absolutely and unconditionally void—in other words was no sale at all. This proposition has frequently been sustained by the Supreme Court of the United States in the cases of *Stoddard* v. *Chambers*, 2 How., 317, frequently reaffirmed in subsequent cases. The defendant in the court below claim the land under a New Madrid location which covered the land claimed by the plaintiff under a prior Spanish grant. The plaintiff's title had been confirmed by Congress under the act of 1836, with a provisal similar to that found in the law of 1891, 'That if it should be found that any tract had been previously located by any other person or persons under any law of the United States or surveyed or sold by the United States that act should confer no title over such lands in opposition to the rights acquired by such location or purchase.' It was contended that by virtue of this provisal the New Madrid title was the better. Held, 'That sale meant one made under and by virtue of law. That the holder of the New Madrid certificate had a right to locate it only on public lands which had been authorized to be sold but having been located on land claimed, a Spanish grant reserved from sale by act of Congress, said location and sale was utterly void." *The inquiry here is whether the defendant has any titles as against the plaintiff, and there seems to be no difficulty in answering the question that he has not. His location was made in lands not liable to be thus appropriated but expressly reserved. No title can be held valid which has been acquired against law, and such is the character of the defendant's title so far as it trenches on the plaintiff's.*"

Stoddard v. *Chambers*, 2 How., 284–316–7, reaffirmed in
Mills v. *Stoddard*, 8 How., 345–353–6–7–362–5–6.
Bryan v. *Shirleff*, 53 Tex., 440–484.
Barry v. *Gamble*, 3 How., 32–5.
Mackey v. *Easton*, 19 Wall., 619–626–8–9.
Menard's Heirs v. *Massey*, 8 How., 293–307–8.
Bissell v. *Penrose*, 8 How., 317–331–2.

Minn v. C Conn 29 Ark 571 - 8 S. 457
Shumard v. Fleming 29 Tex 408 Sup

Field v. *Seating*, 19 How., 332.
Kemble v. *Whesler*, 22 Tex., 77–85.
7 Tex., 441. 1 Tex., 721–730.

Here then a sale having been made reserving our rights and as to us, contrary to law, and therefore void was in fact no sale at all. Is it possible under these authorities for "proof" to be made "To the satisfaction of this Court," that "A sale or grant has been made by the United States" which is legally effectual to deprive us of our property or any part thereof. To do this you must decide contrary to the decisions that a "*Title can be held valid which has been acquired against law.*" But it may be suggested that Congress has so declared, and the Court must carry out the instructions of the superior powers. We deny this for the following reasons:

First—Conceding that Congress had the right—which we deny—to destroy vested rights by making valid what was void: To do this we insist that strong, direct, positive and unequivocal words must be used. It must have been provided that an illegal sale be made legal, that the sale which had been made so as "Not to affect the adverse rights of any person whomsoever" must have been made by direct words to destroy our rights. That this limitation was not taken off of their grant or the power of distinction of our grant given by the quit claim or relinquishment on the part of the United States in the simple provision that "Such title shall remain valid."

Second—This title as to us was void, and never could be made valid as against our rights, even by Congress itself.

Third—Our grant was a contract executed in writing and by possession and survey, and was therefore protected by treaty between the two nations. A statute annulling such a conveyance is unconstitutional, because it deprives us of our property without due process of law. Property can be taken for public use only after payment of compensation. It cannot be taken for private use upon any conditions; much less so without full compensation. Therefore legislative power is incompetent to annul our grant and grant the land to another, such law is void. Some authorities hold that the legislature may impair imperfect or incipient titles, but all rule that it cannot destroy a right which has once become acquired as valid in law or equity. It may provide that the owner of a title must comply with certain reasonable conditions, such as bringing suit in a certain time or under the penalty of forfeiture for neglect. This only effects the remedy, and is not unlawful. It might be that Congress may enact a law affecting a treaty with foreign nations, the same as it could repeal its own acts, but it cannot pass a law destroying vested rights, that would be unconstitutional.

U. S. v. *Arredondo*, 6 Peters, 737–8.
Fletcher v. *Peck*, 6 Cranch, 87.

Warren v. *Sleuman*, 5 Tex., 442.
Lewis v. *Mixon*, 11 Tex., 564–570–1.
See 1st and 2d point of Argument, pp. 67–105.
Wright v. *Hawkins*, 28 Tex., 452.
Sherwood v. *Fleming*, 25 Tex. Supplement 408–9.
Hamilton v. *Avery*, 20 Tex., 612.
Howard v *Perry*, 7 Tex., 259.
DeCordora v. *Galveston*, 4 Tex., 470.
Kimmell v. *Wheeler*, 22 Tex.. 77.
Bryan v. *Shirley*, 53 Tex., 440.

Congress has no constitutional power to settle or interfere with rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary.

Wilson v. *Wall*, 6 Wall., 89.
Holden v. *Joy*, 17 Wall., 211–247–250.

NOTICE, AND ABSOLUTE PROOF AND RECOGNITION OF OUR GRANT.

Our grant since 1823 has been kept continually on the records of the land office at Santa Fe, and reported by the surveyor-general as an unsettled claim. See schedule of documents relating to grants of lands by the Spanish and Mexican governments in the archives of the surveyor general of New Mexico.

No.	Archive No.	Year	Name	Nature of Document,	County
505	410.	1823	HEATH, JOHN G.	GRANT.	DONA ANA.

There has been no action of congress on this and many other similar claims until the passage of the act of March 3, 1891. The record of our title in Mexico and the filing of the copy thereof in the archives of Santa Fe, where, subsequently the general land office of the territory was located, fully met the requirements of all the laws and statutes on the subject. This gave notice to the government and all subsequent claimants of the grant, and they were bound to take notice of it.

Airhart v. *Massieu*, 8 Otto, 491–505.
U. S. v. *Vallego*, 1 Black., 541–555.
Bryne v. *Vagan*, 16 Tex., 392–399.
Guelbeau v. *Mays*, 15 Tex., 411.

The survey of the land into possession of which we were placed, being definitely marked and fixed with distinct lines and corners, both natural and artificial, stone monuments and natural points being used, can at this date be designated, traced and located—the initial point, the head of the Bracito acequia, the la cueva or cave near the Organ mountains, the south-east corner and other points on the survey are all well known. Of this the defendants and all the world were obliged to take notice.

When parties locate land with actual knowledge of a prior equity or under cirumstances which make it a duty to take notice,

they and their privies are bound by such equity. Such locations are fraudulent and cannot be benefited by a patent.

Airhart v. *Massieu*, 8 Otto, 505.
Magee v. *Chadron*, 30 Tex., 644–660.
1 Tex., 203; 7 Tex., 266; 14 Tex., 278; 22 Tex., 565.

As between two purchasers of the same land from the government, the latter is chargeable with notice of any facts appearing by the records of the land office at which he purchased, going to show the title or claim of the first purchaser.

Webb, on Record of Title, Sec. 135–152.
Schnee v. *Schnee*, 23 Wis., 377.
Minter v. *Crommelin*, 18 How., 87.

Index entries, even though no description of property is entered will be held as sufficient if it discloses enough to put a prudent examiner on inquiry a on such inquiry an adverse title would have been ascertained.

Wardvelle on Abstract of Title, p. 75, Sec. 11.

Ponce de Leon as a witness for Hugh Stevens testified, in 1849, to a grant having been made to Juan Gid for this land by Mexican government in 1823. See pages 56 to 59 of Argument, to which special attention of this court is invited.

See also evidence of Major Teel, page 132 of the record, and deposition of Gregoria Herreia and Price Cooper, pages 132 and 129.

The power of Congress relative to treaty obligations is absolute and supreme. The action of the government thereunder, and the rights which a perfect title ensures to its possessor, can not be impaired or defeated in any respect by the statute of limitation of the states.

The statute of limitation against Mexican claims, which needs confirmation, does not begin to run until patent is issued by the United States.

Henshaw v. *Bissell*, 85 U. S., 555–270.
Montgomery v. *Bevens*, 1 Sawyer, 680.
Gardiner v. *Miller*, 47 Cal., 570–575.
Doran v. *The Central Pacific R. R. Co.*, 24 Cal., 266.
Hagan v. *Spect*, 48 Cal., 406.
Galindo v. *Wittenmeyer*, 49 Cal., 12.
Emerin v. *Alvarado*, 64 Cal., 609.
Riverside L. & I. Co. v. *Jensen*, 66 Cal., 300.
Cleaves v. *Whitney*, 16 Pacf., 608.

The occupation of land derived from the United States before issue of a patent for a period prescribed by the statute of limita-

tion of the states, is not a bar to an action of ejectment for the possession of such land found upon the legal title subsequently conveyed by the patent.

Gibson v. *Chauteau*, 13 Wallace, 92, 99, 100–4.
King v. *Thomas*, 12 Pacf., 865.
Gardiner v. *Miller*, 47 Cal., 570.
Palmer v. *Low*, 98 U. S., 1.
Lindsley v. *Miller*, 6 Peters. 666.
McCloskey v. *Barr*, 38 Fed., 165.
Irvin v. *Marshall*, 10 How., 558.
Paschal v. *Dangerfield*, 37 Tex., 273–289–305.

The principle of these decisions is the inevitable result of the effect of the law of Congress of 1854, which provides that all claims under Mexican grants should be submitted to the surveyor-general, who was to report his action on them to Congress for final determination. It has frequently been held that under this act all claims, whether grounded upon an inchoate or perfect title, were to be adequately protected and that this duty, imposed by a sense of national justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a hearing and determination. And that until Congress acted upon the report of the surveyor-general the courts could not pass upon any questions involving the title to lands of Spanish or Mexican origin prior to the Guadalupe treaty; that jurisdiction had been given to a particular tribunal, and therefore could not be taken up and decided by another. This being so no statute of limitation passed by a state or territory could affect the rights of such claimants.

Astrazaran v. *Santa Rita Co.*, 20 Pacf., 189.
Astrazarau v. *Santa Rita Co.*, 148 U. S., 80.
Cameron v. *U. S.*, 148 U. S., 301.
Chavez v. *Chavez*, 32 Pacf., 137–144.
Tameling v. *Emigration Co.*, 93 U. S., 644.
Newhall v. *Sanger*, 92 U. S., 761.
Leavenworth Ry. Co. v. *U. S.*, 733.
Johnson v. *Towsley*, 13 Wall., 72; 104 U. S., 636.

Limitation does not begin to run against an action for the recovery of land claimed under a Mexican grant, until the issuance of a patent to the claimant.

Valentine v. *Sloss*, 37 Pacf., 326–8–9.

In the case of *Teschemacher* v. *Thompson*, 18 Cal., 2[illegible] Judge Field, speaking of the power, duty and right of the Government of the United States under the Act of 1854, and other laws, to protect all titles, legal or equitable, acquired previous to the cession, said:

"It must determine for itself what claims to property existed at that date,

which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims it must necessarily make them good as against others *asserting interests from events subsequently transpiring*, for whatever interest they may possess were acquired with full knowledge of the treaty and of the obligations and powers of the new government, over which it is sovereign and supreme."

If our grant vested in us a title, and said title has not been forfeited, then these defendants are trespassers *ab initio* and are trespassers still, or, in other words, if our title was good, legal or equitable when New Mexico was ceded to the United States, it is valid to-day, and the land is still ours. Nothing done or omitted to be done after that period will affect our title.

Hornsby v. *U. S.*, 10 Wall., 224–239.

People v. *Folsom*, 5 Cal., 374–361.

Page 118 of this argument.

This case is to be determined upon what were our rights at the date of the cession of the territory. If we had a title at that time which the Government of Mexico ought, in good conscience, equity or law, to have respected, then this court must sustain our petition. Our grant having been made with authority, we had a vested right which could be divested only according to law. And if, by reason of the tide of political feeling against Iturbide and the Imperial Colonization law of 1823, one of his most important policies, Heath's rights and possession were interferred with by the Mexican authorities, it is the very essence of judicial authority, and the bounden duty of this Honorable Court, under the treaty and laws of nations to inquire whether this was done in violation of law, and, if it was, then to give appropriate remedy.

Johnson v. *Towsley*, 13 Wall., 72–85.

RECAPITULATION.

We submit that the following are a few of the cardinal principles of our case which are fully sustained by the pleadings, facts, decisions quoted, the treaty of Guadalupe Hidalgo and international law:

I.

That the grant to Heath was legally made, the ayuntamiento having authority under the law of 1823 to make such a grant to a colonist. That this grant was made absolute to Gid, individually, as a colonist, and not to him as an empresario. (Pages 16 to 79.)

II.

That the grant to Heath or Gid was made in 1823 as claimed, was recorded in the records of the ayuntamiento of El Paso, and properly placed or filed in the old Spanish and Mexican archives at Santa Fe, Mexico, according to law. (See pages 79 to 82.)

III.

That our grant was not a float, but one by specific boundaries, with center point and all corners and lines definitely fixed and located. (Pages 34 to 37.)

IV.

That Heath's grant was never annulled or revoked by authority of law. (Pages 71 to 79.)

V.

That this grant vested in Heath a title in fee *in presenti* which is protected by the treaty of the United States with Mexico and the law of nations. (Pages 89 to 95.)

VI.

1—There was no abandonment, forfeiture or denouncement of Heath's grant. Repeal of the law of 1823 releaved the forfeiture. (Page 95.)

2—The Mexican government interfered with and prevented performance of subsequent conditions by Heath thus causing his title to become absolute. Including evidence to sustain the proposition. (Pages 99 to 113.)

3—Act of grantor hindered performance and rendered conditions absolute. (Pages 113 to 120.)

Laches not applicable to this case. (Pages 120 to 123.)

There was no abandonment. (Page 127.)

4—No forfeiture occurred or was ever declared. (Pages 131 to 140.)

VII.

That the equities of the case are all with the plaintiffs; outitle is the oldest and best, the defendants taking with full knowlr edge of our rights and with positive proof and recognition of our grant are now estopped from denying our claim. (Pages 140 to 152.)

In the court below, defendants *plead abandonment*, but "*abandoned*" their plea without legally proving facts or offering argument or decisions to sustain it. They did not discuss the questions of denouncement or forfeiture, further than to argue that as Heath died in the United States *his heirs could not inherit land in Mexico*, a question not in the case, as the land at the time of his death was in the United States.

We submit that the validity of our grant is clearly sustained, that it has been shown that the Mexican government in 1828 recognized and sustained a similar grant that had been made to Jose Lerma the latter part of the year 1823 by the same authority that gave Heath his title, that the government of the United States recognized our title in proceedings to obtain confirmation of the Stevenson and Garcia grant; and that the honesty and justice of our claim is clearly sustained by abundant proof of the faithful effort on our part to fulfill the contract by performing the conditions subsequent which were prevented by the acts of the grantor. We therefore submit that this court should reverse the decree of the U. S., Land Court and sustain our petition in all its parts by granting the plaintiffs the land claimed.

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Robert Rae,
Of Counsel for Petitioners.